CLERK'S COPY.
PV
179
402903
Sup Ct.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 38

HOWARD S. PALMER, JAMES LEE LOOMIS AND HENRY B. SAWYER, TRUSTEES OF THE PROPERTY OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR, PETITIONERS,

vs.

CONNECTICUT RAILWAY & LIGHTING COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 29, 1940.

CERTIORARI GRANTED APRIL 22, 1940.

Blank Page

INDEX.

	PAGE
Statement Under Rule 13	1
Proof of Claim	4
Exhibit A, Annexed to Proof of Claim including: Lease dated Dec. 19, 1906 by Claimant to The Consolidated Railway Company	5
Guarantee of lease by the New Haven	29
Order Upon Claims of Connecticut Railway and Lighting Company, No. 214	31
Order on Mandate on Claims of Connecticut Railway and Lighting Company, No. 214A	37
Petition of Trustees of the Property of the Principal Debtor for Modification of Order No. 214A on Claims of Connecticut Railway and Lighting Company	40
Affidavit in Opposition to the Petition of the Debtor for Modification of Order No. 214-A	45
Order on Petition of Trustees of the Property of the Principal Debtor for Modification of Order No. 214A	52
Order Appealed from	54
Minutes of Hearings	56
Notice of Appeal	264
Memorandum of Decision on Claim of Connecticut Railway and Lighting Company	265
Stipulation as to Record	291
Clerk's Certificate	292
Proceedings in U. S. C. C. A., Second Circuit	293
Opinion, Patterson, J.	293
Judgment	302
Clerk's certificate	304
Order allowing certiorari	305

TESTIMONY

Witnesses for Petitioner:

PAGE

Carl H. Zipf:
- Direct 59
- Direct (Continued) 103
- Cross 141

A. G. Cederstrom:
- Direct 88
- Cross 94
- Redirect 100

Walter Carr:
- Direct 159
- Cross 160

Percy R. Leete:
- Direct 161
- Cross 192
- Redirect 206

EXHIBITS

	Admitted Page	Printed Page
X-1 of March 13, 1939—Statements of rentals payable by The New York, New Haven and Hartford Railroad Company under Lease Agreement of December 19, 1906 and subsequent agreements	61	220
X-2 of March 13, 1939—Statement of damages by Connecticut Railway and Lighting Company for the period from January 1, 1936 to December 31, 1975	126	220
X-2A of March 15, 1939—Statement of damages by Connecticut Railway and Lighting Company for the period from January 1, 1936 to December 31, 1975	131	224
X-2AA of March 15, 1939—Statement of net operating income before Federal income taxes of Connecticut Railway and Lighting Company transportation properties from July 1, 1937 to December 31, 1938	132	228
X-2B of March 15, 1939—Statement of damages by Connecticut Railway and Lighting Company for the period from January 1, 1936 to December 31, 1975	134	228
X-2BB of March 15, 1939—Statement of net operating income before Federal taxes of Connecticut Railway and Lighting Company transportation properties for the years 1936-1938, inclusive	134	231
X-2C of March 15, 1939—Statement of damages by Connecticut Railway and Lighting Company for the period from January 1, 1936 to December 31, 1975	137	232

	Admitted Page	Printed Page
X-2CC of March 15, 1939—Statement of net operating income before Federal taxes of Connecticut Railway and Lighting Company transportation properties for the years 1929-1938, inclusive	138	236
X-2D of March 15, 1939—Statement of damages by Connecticut Railway and Lighting Company for the period from January 1, 1936 to December 31, 1975	191	236
X-2DD of March 15, 1939—Statement of net operating income before Federal taxes of Connecticut Railway and Lighting Company transportation properties for the years 1925-1938, inclusive	191	240
X-3 of March 13, 1939—Statement of damages by Connecticut Railway and Lighting Company for the period from December 18, 1935 to December 31, 1935	67	241
X-4 of March 13, 1939—Statement showing net income from transportation properties of Connecticut Railway and Lighting Company for the period from December 18, 1935 to December 31, 1938	75	242
X-5 of March 13, 1939—Statement of Annual Earning power of three-fourths of the contents of the Sinking Fund referred to in lease of December 19, 1906 as at October 23, 1935	76	244
X-6 of March 13, 1939—Statement of net operating income before Federal taxes of Connecticut Railway and Lighting Company transportation properties for the years 1924-1938, inclusive	116	244
X-7 of March 13, 1939—Two sheets: Chart of United States Treasury Bond Yields	91	246

	Admitted Page	Printed Page
X-8 of March 13, 1939—Three sheets: Chart of Municipal Bond Yields	92	248
X-9 of March 13, 1939—Graph: Source. Standard Trade and Securities. Friday, March 4, 1938	93	250
X-10 of March 13, 1939—Chart I—Absolute Growth of Life Insurance Assets—1906-1937; Chart II—Relative Growth of Life Insurance Assets—1906-1937	93	252
X-11 of March 15, 1939—Percent of Connecticut Railway and Lighting Company to Connecticut Company System Total	112	254
X-12 of March 15, 1939, for Identification—Statement of Estimated Operating Income of The Connecticut Railway and Lighting Company—Years 1925-1935, Inclusive	162	254
Y-1 of March 15, 1939—Statement of Estimated Operating Income of The Connecticut Railway and Lighting Company—Years 1921-1935, Inclusive	206	256
Y-2 of March 15, 1939—Operating income of controversial routes awarded to the Connecticut Railway and Lighting Company by Court Order No. 62-A from date of their institution	206	258
Y-3 of March 15, 1939—Operating income of The Connecticut Company and Connecticut Railway and Lighting Company combined before Federal income taxes	206	259
Y-4 of March 15, 1939—Percent of Connecticut Railway and Lighting Company to Connecticut Company system total	206	260
W—Schedule prepared by Percy R. Leete	219	261

Blank Page

United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT.

In Proceedings for the Reorganization of a Railroad

IN THE MATTER
of
THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Debtor.

Statement Under Rule 13.

This proceeding was commenced on October 23, 1935 by the filing, in the United States District Court for the District of Connecticut, on that date, of a petition by the debtor to the effect that it desired to effect a plan of reorganization in accordance with Section 77 of the Bankruptcy Act. On that date an order was entered, granting said petition.

The original parties and those who have become parties to that part of this proceeding involving this appeal, are as follows:

The claimant-appellant, Connecticut Railway and Lighting Company; Howard S. Palmer, James Lee Loomis, and Henry B. Sawyer, as Trustees of the property of The New York, New Haven and Hartford Railroad Company; The New York, New Haven and Hartford Railroad Company, the debtor.

There have also become parties to the general proceeding for reorganization of The New York, New Haven and Hartford Railroad Company, debtor, No. 16562 on the docket of the District Court for the District of Connecticut,

Statement Under Rule 13.

4 or have appeared in said proceedings, numerous other parties none of whom, however, is a party to this appeal.

The lease was rejected December 18, 1935 pursuant to authority granted by the District Court.

The proof of claim of the claimant-appellant was filed on April 30, 1936. The answer of the Trustees of the debtor to said proof of claim was filed herein on February 11, 1937. The reply of the claimant-appellant was filed herein on May 19, 1937.

There has been no order of arrest and no attachment has been issued and no bail taken.

5 Trial of the issues raised by the proof of claim, answer and reply, was had before the Hon. Carroll C. Hincks, United States District Judge, in the United States District Court for the District of Connecticut, at New Haven, Connecticut, from June 30, 1937 through July 3, 1937, and an order on said proof of claim of the claimant-appellant was made and filed in these proceedings on September 27, 1937. At said trial the Court excluded no evidence offered by claimant of damages due to rejection of the lease by any ruling during the hearing. Thereafter, the claimant-appellant appealed to this Court from said order of

6 September 27, 1937 and an appeal was allowed on October 15, 1937. Said appeal was argued in this Court on January 4, 1938 and decided by this Court on March 7, 1938.

On March 14, 1938 an order in accordance with the opinion of this Court, modifying the order of the District Court, was filed herein and a mandate was directed to be issued to the District Court in accordance with the decree of this Court.

On March 26, 1938 a petition for a rehearing was denied by this Court. The District Court, on September 30, 1938, entered an order on mandate.

On October 10, 1938 the Supreme Court of the United States granted the petition of the claimant-appellant for

Statement Under Rule 13.

a writ of certiorari to the United States Circuit Court of Appeals for the 2nd Circuit. The appeal to the United States Supreme Court was argued in that Court on November 10th and 14th, 1938, and was decided by the United States Supreme Court on January 3, 1939.

The opinion of the Court, delivered by Mr. Justice Reed, appears at 305 U. S. 493.

The matter was remanded to the District Court for the District of Connecticut for further proceedings, in accordance with the decision of the United States Supreme Court. Trial of the issues herein was commenced on March 13, 1939 and was continued on March 15, 1939 before the Hon. Carroll C. Hincks, United States District Judge, in the United States District Court for the District of Connecticut, at New Haven, Conn.

The order on the decision of the Hon. Carroll C. Hincks upon said issues was made and filed herein on September 15, 1939 and the claimant-appellant is now appealing from said order.

No question was referred to a Commissioner or Commissioners, Master, or Referee.

The appeal to this Court was taken by Notice of Appeal dated September 26, 1939.

Claimant-appellant appears herein by Messrs. Emmet, Marvin & Martin, 48 Wall Street, New York City.

The appellees appear herein, respectively, as follows:

Howard S. Palmer, James Lee Loomis, and Henry B. Sawyer, as Trustees of the property of the Debtor, by H. J. Wells, Esq., and James Garfield, Esq.

Address: The New York, New Haven & Hartford R. R. Company, Yellow Building, New Haven, Conn.

The Debtor, by H. J. Wells, Esq.,

The New York, New Haven & Hartford R. R. Company, Yellow Building, New Haven, Conn.

10

Proof of Claim.

DISTRICT COURT OF THE UNITED STATES,

FOR THE DISTRICT OF CONNECTICUT.

In Proceeding for the Reorganization of a Railroad.

IN THE MATTER of THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Debtor.	No. 16562

11

The appellant's proof of claim, sworn to April 24, 1936, was filed herein as *Claim No. 203*. Said proof of claim is not being printed, but portions of *Exhibit A* annexed thereto, consisting of the lease dated December 19, 1906 by the claimant to the Consolidated Railway Company, and the guarantee of that lease by the New Haven Railroad, are printed following this statement. Various other portions of said Exhibit A, consisting of sub-leases, agreements, acceptances and assignments are not being printed, either because they are irrelevant or believed to be unnecessary to a consideration of this appeal.

12

Exhibit A Annexed to Proof of Claim.

LEASE

CONNECTICUT RAILWAY AND LIGHTING COMPANY

TO

THE CONSOLIDATED RAILWAY COMPANY

DATED DECEMBER 19, 1906.

Schedules A, B, C, D, E, F, G and 1 herein referred to are not printed.

CONNECTICUT RAILWAY AND LIGHTING COMPANY, hereinafter called the Lessor, hereby demises and lets unto THE CONSOLIDATED RAILWAY COMPANY, hereinafter called the Lessee, and to its successors and assigns, both the Lessor and Lessee being corporations existing under the laws of the State of Connecticut, all its property, of every nature whatsoever, now owned or hereafter acquired, together with the right to demand and receive, for the Lessee's own use, all tolls, rents, revenues, income and profits of the demised premises, including all the right, title and interest of the Lessor in and to all the property described as mortgaged in the Indenture of Mortgage between Connecticut Railway and Lighting Company and Colonial Trust Company, Trustee, dated January 15, 1901, and recorded in the office of the Secretary of State of Connecticut in Volume 5, at pages 406 to 531, inclusive, of the Records of Railroad Mortgages, etc., to which record reference should be had for a fuller description, excepting therefrom such real property, rights, powers and franchises as have heretofore, after the date of said mortgage and prior to the execution of this lease, been sold and conveyed by the Lessor, as shown in Schedule A hereinafter

referred to, but not including personal property heretofore disposed of, as permitted by said mortgage; including also all its right, title and interest in and to all the property, whether real or personal (including the accumulations prior to August 1, 1906, of sinking fund referred to in Schedule B hereinafter mentioned), owned, possessed or used by it, situated in the several towns in the State of Connecticut hereinafter named; including also all its right, title and interest in, to or under any grants, orders, decisions, decrees, judgments or permits of any governmental or municipal authority, and in, to or under any franchises, privileges, licenses, permits, leases, contracts, covenants, declarations of trusts and agreements, and including all its right, title and interest in or to any property or assets of any description, and whether real or personal, and whether in possession or action, and however described and wherever situated; reserving only to the Lessor the rental hereinafter specified, such franchises as are necessary in order to enable it to maintain its existence and activity as a corporation, in order to enable it to perform its obligations under this lease, as well as such other of its obligations as are not assumed and performed by the Lessee, in order to enable it to receive, hold, manage and pay out or dispose of the sums of money which shall be by it received as rental under this lease, or otherwise, and in order to enable it to protect the interests of its stockholders and creditors, according to the true intent and meaning of this lease, and reserving to the Lessor the possession and control of its corporate seal, of the record books of meetings of its stockholders and directors, and of its stock books, transfer books and Treasurer's books and accounts, and its contracts and records other than its maps and deeds and other evidences of title; it being understood and agreed, however, that the Lessee shall have access to any books of account, contracts and other records of

the Lessor when necessary in the judgment of the Lessee to carry out the purposes of this lease.

The Lessor represents and covenants that the property which it hereby demises, and for which the rental hereinafter specified is agreed to be paid, includes among other things all the electric railways now operated or maintained by it in streets and upon private lands in the following towns of the State of Connecticut, to wit: Darien, Norwalk, Saugatuck, Westport, Fairfield, Bridgeport, Stratford, Milford, Huntington, Derby, Ansonia, Seymour, Orange, Waterbury, Naugatuck, Cheshire, Prospect, Hamden, Southington, Plainville, New Britain, Berlin and Newington, together with the appurtenances of said electric railways and with the rolling stock and railway equipment now in the possession of the Lessor and also all the property, rights, privileges and franchises of The Norwalk, Bridgeport and Bethel Traction Company and of Thomaston and Watertown Electric Railway Company, excepting as shown in Schedule A hereinafter referred to; all the plants or appurtenances now possessed, operated, or used by the Lessor for the generation, distribution or sale of electricity for light, power or other purposes, including such of its plants as are now existing in the following towns of the State of Connecticut: Cheshire, Greenwich, New Britain, Berlin, Newington, Plainville, Southington, Norwalk (including the city of South Norwalk), New Canaan, Waterbury, Naugatuck and Watertown, together with their appurtenances; all the plants now operated or maintained by it for the generation, distribution or sale of gas in the towns of Naugatuck, Greenwich and Norwalk (including the City of South Norwalk), in the State of Connecticut, together with their appurtenances; all rents, reimbursements and profits arising or hereafter to be obtained from a certain agreement between the Lessor and The United Gas Improvement Company, marked Schedule

1 and hereinafter referred to, also all of the Lessor's right, title and interest in and to said agreement and in and to the agreement and lease therein referred to and to any renewal thereof; a lease of The Roton Point Improvement Company dated January 1, 1903, for a period of three (3) years, renewed for a period of ten (10) years from November 15, 1904; also all papers, documents, maps, surveys, certificates, deeds and conveyances showing the nature of the Lessor's right, title and interest in or to the property hereby demised, or any part thereof; provided, however,
23 that the Lessor shall at all reasonable times either have access to the original maps, deeds and other evidences of title or at the option of the Lessee shall be furnished with accurate and authentic copies of the same.

And the Lessor further represents and covenants that it has not granted or conveyed away any of the franchises granted by the General Assembly of the State of Connecticut to or otherwise acquired by the Lessor or by Cheshire Street Railway Company, The Greenwich Gas and Electric Lighting Company, The Norwalk Gas Light Company, Norwalk and South Norwalk Electric Light Company, Naugatuck Electric Light Company, Southington and Plantsville Tramway Company, Waterbury Trac-
24 tion Company, The Norwalk Street Railway Company, Central Railway and Electric Company, The Norwalk Tramway Company, The Westport and Saugatuck Street Railway Company, Milford Street Railway Company, The Bridgeport Traction Company, The Derby Street Railway Company, The Shelton Street Railway Company, The Norwalk, Bridgeport and Bethel Traction Company, and Thomaston and Watertown Electric Railway Company, excepting as shown in Schedule A hereinbefore referred to.

The Lessor further covenants that it will cause the construction of the railway of The Naugatuck Valley Electric Railway Company to be completed from a connection

with the existing railway of the Lessor in the town of Naugatuck to a connection with the existing railway of the Lessor in the town of Seymour, in accordance with the contract heretofore made for its construction, and that it will acquire, by purchase or otherwise, all the franchises, powers, rights and privileges of said The Naugatuck Valley Electric Railway Company, and that thereupon the said completed railway and the said franchises, powers, rights and privileges without expense to the Lessee (who shall be saved harmless by the Lessor from all debts of and liens and incumbrances upon said Railway Company, excepting those arising from the operation of the road and excepting the aforesaid mortgage of the Lessor) shall become subject to the terms of this lease as if at the time of the execution of this lease such franchises, powers, rights and privileges and such completed railway had been owned and possessed by the Lessor.

To Have and to Hold the premises unto said The Consolidated Railway Company, its successors and assigns, to its and their use for the term of nine hundred and ninety-nine (999) years from the first day of August, 1906, inclusive of said day. Provided that if it so be that the right to or to the use or enjoyment of any of the property hereinbefore referred to, which the Lessor now has or enjoys, would not pass to the Lessee but would be impaired or lost to the Lessor by reason of this lease, then so much of said property is excepted herefrom and not included herein; but in such case the Lessor covenants to do and perform at the expense of the Lessee any lawful act or thing in relation thereto which the Lessee may request to enable the Lessee to have, use and enjoy the same as near as may be to the same extent as the remainder of the property hereby demised.

The Lessor covenants with the Lessee, its successors and assigns, that it has good right to make this lease in

manner and form as herein written, and the Lessee covenants with the Lessor, its successors and assigns, that it has good right to make and take this lease in manner and form as herein written.

And the Lessor covenants that there are no existing mortgages upon the demised premises other than those enumerated in Schedule B, hereto attached, subject to which the premises are demised by the Lessor to the Lessee. If it shall be ascertained that there are liens or incumbrances on said demised premises other than said mortgages, representing claims growing out of construction arising prior to August 1, 1906, the Lessor covenants to indemnify the Lessee against all loss, cost or damage arising therefrom.

The Lessor further covenants that the Lessee, its successors and assigns, upon payment in the manner herein provided of the rent herein reserved and agreed to be paid by the Lessee and the keeping and performing of the covenants and agreements herein provided by the Lessee to be kept and performed on its part, shall have the uninterrupted possession, use, control and management of the property herein demised and all the tolls, rents, revenues, income, profits and benefit of the demised premises in its quiet, peaceful possession and enjoyment without detriment, hindrance, interruption or molestation from said Lessor, its successors and assigns, for and during the term of this lease, subject, however, to the mortgages described in Schedule B and to such mortgages as shall hereafter be made in accordance with the provisions of this lease.

And the Lessor further covenants that it will, during the continuance of this lease, maintain its existence and organization as a corporation in due form of law, and for that purpose will hold all necessary meetings, elect all necessary officers, and make all necessary records, reports,

transfers and reissues of stock certificates at its own expense, and that it will from time to time, and at all times when thereto required by said Lessee, do and perform at the expense of the Lessee all such other acts, matters and things consistent with the rights of said Lessor under this lease as shall be necessary in the opinion and judgment of the said Lessee for the due preservation and protection of all the estate, property, rights, franchises and interests herein demised to the Lessee, and to carry into full effect the true intent and meaning of this lease, and that in default thereof the same may be done by the said Lessee, its successors or assigns, or its or their lawful agents in the name and as the act of the said Lessor.

The Lessor further covenants that it will from time to time, if so requested by the Lessee, proceed to take, appropriate and condemn in due form of law, such real estate as the convenient exercise of the demised franchises or operation of the demised railways, lighting and power plants and other property, or as the orders of any public, governmental or municipal authority may render necessary or desirable in the opinion of the Lessee, the Lessee, however, advancing and paying all the expense therefor incurred, including the legal expenses.

The Lessor further covenants that the Lessee may use the Lessor's name in prosecuting or defending any suits or proceedings so far as the Lessee may deem necessary for the use, quiet enjoyment or protection of the demised premises or to protect itself against unlawful exactions or demands by or under any public authority, but at the sole expense of the Lessee, saving the Lessor harmless from all loss, costs or damages thereby accruing.

The Lessor further covenants that it will from time to time, and at any time hereafter, at the request of the Lessee, execute and deliver all other and further specific or general assignments and transfers, conveyances, instru-

ments and assurances in the law for the further, better or more perfect assuring and vesting or confirming in and to the Lessee the demised premises, according to the true intent and meaning of these presents as by the Lessee shall or may be reasonably advised or required; but it is expressly covenanted that all such assurances, transfers and conveyances shall only be for the term and subject to the provisions of this lease.

The Lessor further covenants that it has issued no outstanding bonds, notes, or other evidences of indebtedness except those described in Schedule B; that during the continuance of this lease the Lessor will not without the written consent of the Lessee, except to refund or discharge its present funded debt or any debt incurred in accordance with the provisions of this lease, extend the time of payment of any bonds outstanding at any time, or issue any other bonds, notes, obligations or evidences of indebtedness than those now outstanding, or call any bonds for purchase or payment; and that the Lessor during the continuance in force of this lease, will not violate any of the covenants, agreements or conditions, either of any of the instruments referred to in Schedule B or of any mortgages hereafter executed by the Lessor, by doing or omitting anything which in accordance with the true intent and meaning of this lease ought not to be done or omitted by the Lessor.

The Lessor covenants that for the purpose of discharging the bonded indebtedness shown in Schedule B and such bonded indebtedness as shall hereafter be created under the provisions of this lease, it will upon and in accordance with the written demand of the Lessee at any time during the continuance of this lease, make, execute and deliver to the Lessee its new bonds or other obligations or evidences of indebtedness (secured by mortgage upon all or part of the demised property if and as the Lessee may desire), and that the bonds or obligations or evidences

of indebtedness so issued shall be for such time, and they and any mortgage securing the same shall be in such form and contain such terms, provisions, covenants and conditions as the Lessee shall determine and as the Lessor may lawfully issue. Provided, that the total amount of such bonds, obligations or evidences of indebtedness outstanding at any time shall not be increased beyond the amount of the bonded indebtedness shown in Schedule B, and that the aggregate amount of interest annually payable thereon and of annual payments into any sinking funds shall not exceed the sum of six hundred and seventy-three thousand eight hundred and eighty-two dollars ($673,882), and that the liabilities of the Lessor under such bonds, obligations, evidences of indebtedness and mortgages shall not be more burdensome than at present. And further provided that in case such new bonds, obligations or evidences of indebtedness should be so drawn as to mature contemporaneously with or at a date later than the expiration of said term, they and any mortgage securing the same shall be in such form and contain such terms, provisions, covenants and conditions as shall be acceptable to the Lessor. The Lessee covenants that it will pay the expenses incident to the issue of any bonds hereafter issued according to the provisions of this lease and the recording of the mortgage securing the same, including the engraving of the bonds, and legal expenses.

Until payment in full of the principal and interest of all bonds secured by any existing mortgage described in Schedule B or by any mortgage of the demised property or of any part thereof hereafter made in accordance with the provisions of this lease, such mortgages shall constitute a paramount lien upon all the property, contracts, rights, privileges and franchises demised superior to the estate conveyed to the Lessee under this lease.

Exhibit A, Annexed to Proof of Claim.

The Lessor further covenants that upon and in accordance with the written demand of the Lessee, at any time during the continuance of this lease, it will call or cause to be called for purchase or payment, as the Lessee may desire, any of the bonds of the Lessor then outstanding which the Lessor shall have the right to call or cause to be called; provided, that the Lessee shall furnish the necessary funds for such purchase or payment.

In consideration of the premises, the Lessee hereby covnants and promises for itself, its successors and assigns, to pay to the Lessor (or otherwise, as herein provided) as rental for the demised property, the sums following, to wit:

For the year beginning August 1, 1906, the sum of nine hundred and seventy-five thousand dollars ($975,000);

For the year beginning August 1, 1907, the sum of one million and forty-five thousand dollars ($1,045,000);

For the year beginning August 1, 1908, the sum of one million and forty-five thousand dollars ($1,045,000);

For the year beginning August 1, 1909, the sum of one million one hundred and seventy-five thousand dollars ($1,175,000);

For the year beginning August 1, 1910, the sum of one million two hundred and fifty thousand dollars ($1,250,000);

For the year beginning August 1, 1911, the sum of one million three hundred and fifty thousand dollars ($1,350,000);

For the year beginning August 1, 1912, the sum of one million three hundred and seventy-five thousand dollars ($1,375,000);

For the year beginning August 1, 1913, the sum of one million three hundred and seventy-five thousand dollars ($1,375,000);

For the year beginning August 1, 1914, and annually thereafter during said term the sum of one million four hundred thousand dollars ($1,400,000). 43

Said sums shall be payable as follows, viz.: So much thereof as shall be required to pay the interest upon bonds and to keep and perform the sinking fund agreements of the Lessor shall be paid at the places indicated in Schedule B, hereto annexed, at least ten (10) days prior to the therein indicated due dates of the several respective payments, and at the respective times and places which shall be provided for any such payments of interest or into a sinking fund in any new bonds, obligations or mortgages hereafter to be executed by the Lessor in accordance with the provisions of this lease. 44

The balance of said rentals shall be payable in equal quarterly payments, viz., on the first days of each succeeding November, February, May and August in each and every year (the first payment to be made as of November first, 1906), during said term to the Connecticut Railway and Lighting Company, or its order, at its principal place of business in the State of Connecticut, or in lieu thereof at any other one place it may designate within the United States upon not less than thirty (30) days' notice of such designation in writing to the Lessee. 45

The Lessee also further covenants (provided the Lessor shall keep and perform its covenants herein regarding the execution and delivery to the Lessee of bonds, obligations and mortgages) that during the continuance in force of this lease it will pay the principal of all the bonds described in Schedule B, and of all bonds, obligations or evidences of indebtedness which shall be issued by the Lessor in accordance with the provisions of this lease as the same shall mature or otherwise become payable.

The Lessee further covenants that so far as the assets of the Lessor as enumerated in Schedule C are sufficient for

46 the purpose (including in said assets two hundred and fifty-seven thousand dollars at par of treasury bonds, included in and a portion of total bonded indebtedness shown in Schedule B), it will pay all the outstanding indebtedness and liabilities of the Lessor arising out of the operation, maintenance and construction of the railways or the lighting and power plants of the Lessor prior to August 1, 1906, and shown in the schedule hereinafter referred to marked C. The Lessee further covenants to perform all obligations for the supply of gas and electricity and to pay all indebtedness and liabilities arising from operation,
47 maintenance and construction since July 31, 1906, whether the same be absolute or contingent, as the same shall from time to time fall due or be established, and the Lessee further covenants that it will assume and pay all the liabilities of the Lessor now existing for injuries or damages to persons or property as the same shall from time to time hereafter be established, and will defend at its own expense all actions now pending or hereafter brought against the Lessor on account of claims for such liabilities (the claims for said liabilities so far as the same are known to the Lessor as of December 1, 1906, being shown in schedule hereinafter referred to marked D), and will keep and
48 perform all other contracts in force and binding upon the Lessor at the date hereof, which are shown in Schedule E, hereinafter referred to; provided, that all said assets of the Lessor at the close of business July 31, 1906, in excess of the amount necessary to pay the Lessor's indebtedness on that date, as set out above in this paragraph, and all the gross earnings of the Lessor received by it since July 31, 1906, shall be accounted for to the Lessee as part of the demised premises.

And the Lessee further covenants to pay from time to time during the continuance of this lease all taxes, water rents, rates, charges, license fees and assessments, ordi-

nary and extraordinary, of every nature and description, which may be lawfully imposed or assessed in any way upon the Lessor or Lessee with reference to the demised property, the capital stock of the Lessor, its indebtedness, contracts, rights, privileges, franchises and revenues, or said reserved rental, or the disbursement thereof, or its right to do business or be a corporation; said payments to be made to the authority or treasurer entitled by law to receive the same, whether Federal, State or municipal; the intent of this agreement being that the Lessor may be able to disburse the rentals which it will receive in the annual sums as above mentioned in payment of interest upon debts and for sinking funds and for dividends upon its stock or for other distribution, without being required or finding it necessary to pay, retain or deduct any of the same for any other purpose through or by reason of any imposition or assessment by or under any laws or proceedings heretofore or hereafter made or authorized by the United States or by the State of Connecticut or by any municipality of said State.

And the Lessee covenants at its own expense to maintain said demised premises and property during said term in as good order, repair and condition as the same are now, and in their present state of efficiency, and that at its own expense it will make all improvements, alterations and renewals of said demised property which in its judgment, acting in good faith, may be best adapted to safeguard and develop said property and to promote its interests and to preserve its franchises, rights and powers.

And the Lessee further covenants that at its own risk and expense it will in good faith and to the best of its ability operate the Lessor's said railways, lighting and power plants and all other property leased, operated, owned or controlled by the Lessor and that it will furnish all apparatus, equipment and plant in substitution for and in

addition to that hereby demised which in its judgment may be necessary or proper for such operation.

And the Lessee further covenants that at its own first cost and expense it will enlarge and extend said property within the territorial limits of the towns where said property is now located, and that it will acquire, so far as practicable, necessary franchises, rights and powers in the name of the Lessor, for the purpose of enabling the Lessee to enlarge and extend, as aforesaid, and to carry on, preserve and develop the business, in such manner as shall at all times to the Lessee, acting in good faith, seem adapted to develop and safeguard the property, to promote and preserve its interests, and to extend its franchises and powers within said territorial limits.

It is hereby mutually covenanted that the Lessee may make such lawful changes and alterations in such railways, lighting and power plants and their equipment and appurtenances as the Lessee shall from time to time in good faith find to be for the greatest value of the said demised property regarded as an operated whole and as a permanent source of revenue, and for the purpose of such beneficial changes or alterations may from time to time move, remove, discontinue, abandon, exchange or sell any parts of the demised premises which in its judgment shall no longer be necessary for the uses of said railways, lighting and power plants, and that the Lessor upon the written request of the Lessee will join with the Lessee in any deed or conveyance and in any written request or representations to the Trustee under any mortgage of the Lessor which shall facilitate any such exchange or sale; provided, however, that no such sale or exchange shall be made in violation of the provisions of any mortgage now or hereafter existing thereon, and provided further that other similar property, of equal value to the demised premises as an operated whole shall be conveyed by the Lessee to the Lessor in lieu of any property so abandoned, sold or

55

exchanged, and become a part of the demised premises, but the obligation of the Lessor to join in such deed or conveyance shall not be dependent upon the immediate investment of the proceeds acquired as above, the Lessee hereby agreeing that all the proceeds of any such sale not required for immediate investment shall be held by it as a fund applicable only to such purposes; provided further, that the Lessee shall not, unless with the consent in writing of the Board of Directors of the Lessor, sell or abandon any line or any location or right of way in any highway or elsewhere now or at the time possessed by the Lessor or hereafter acquired by it or by the Lessee and subject to the provisions of this lease, unless the Lessee shall, prior to such sale, have acquired and transferred to the Lessor another location or right of way or other trackage of approximately equal value to that so sold or abandoned.

56

And the Lessee covenants that it will save the Lessor harmless from all suits, costs, damages and expenses by reason of any act or omission of the Lessee in the use of said demised premises under this lease, and, so far as possible during the continuance of this lease, will do every act and thing that may by law be obligatory upon it or upon the Lessor in respect to the demised property and the maintenance, improvement, operation and use of such demised property and every part thereof, including franchises, and will make all returns required by the laws of the State of Connecticut or of the United States in relation to the property hereby leased, to any public officer or legal authority, and should any returns be required by law of the Lessor, will furnish on demand all information necessary therefor.

57

The Lessee covenants that at the expiration of this lease, whether by lapse of time or otherwise, it will deliver to the Lessor possession of the demised property as

58 changed, altered, added to and improved, as hereinabove provided, and that the demised property shall then be in such condition and with such equipment, materials and appurtenances as to fully fit it for the immediate use of the Lessor in the same manner as at present. It is, however, mutually understood and agreed that at the time of such delivery of possession there shall be an equitable adjustment of accounts between the Lessor and Lessee, as follows: (1) The assets represented by cash on hand and choses in action, sinking fund accumulations prior to August 1, 1906, as shown in Schedule B, and the liabilities
59 represented by choses in action shall be adjusted to be equal in net to the assets and liabilities of like character hereby demised to and to be paid by the Lessee; (2) In lieu of the personal property set out in an inventory which shall forthwith be made and agreed to in writing by representatives of the Lessor and Lessee and which shall set out all the personal property delivered by the Lessor to the Lessee at the beginning of the term, the Lessee will deliver to the Lessor the same or other personal property of similar amount, character and uses appropriate for the operation of the demised railways and lighting and power
60 plants; (3) If the Lessee shall have made additions, extensions, betterments and improvements of the demised property of a character other than those described in sentence (4) next following, at the Lessee's sole expense, over and above new investments of the proceeds derived from any insurance policies or other form of protection against fire, and over and above renewals and replacements and what is obtained by exchange or with the proceeds of sales or parts of the demised property, such property shall, in case of the default of the Lessee, revert to and become the property of the Lessor, but the Lessor, upon the termination of this lease for any cause except the default of the Lessee, shall pay to the Lessee the actual

value of such improvements, appraised at the time of such termination as physical property, such value to be fixed by a representative of each of the parties hereto, or in case they cannot agree upon such value, by a third party to be chosen for that purpose by the Chief Justice of the Supreme Court of Connecticut, upon the request of either party, but upon reasonable notice first given to such other party; (4) If the Lessee, with the written consent of the Lessor, shall have extended the mileage of the Lessor's railways by constructing tracks and appurtenances for conveying electricity to operate the same in highways or parts of highways or on private locations between the side lines of which at the execution of this lease there are no tracks, then the Lessor shall, upon the termination of this lease for any cause, either pay to the Lessee the actual value of such extensions and appurtenances, appraised at the time of the termination of this lease as physical property, in the manner stated in sentence (3) next preceding, or the Lessor shall then convey to the Lessee the extensions and appurtenances defined in this sentence (4) which may have been construed, maintained or operated under franchises obtained in the name of the Lessor.

The Lessee shall have the right at any time, subject to the provisions hereof, to assign, sublet, pledge or mortgage this lease and any or all its rights thereunder, provided that when such assignment, sub-lease, pledge or mortgage shall be made, the Lessee shall in writing notify the Lessor thereof, specifying the date of the instrument and the name of the assignee, sub-lessee, pledgee or mortgagee, and thereupon any assignee other than a pledgee or mortgagee shall file with the Lessor its agreement to accept the provisions of such conveyance, together with all the obligations and undertakings assumed by the original Lessee regarding or affecting the assigned property, whereupon said assignee shall be entitled to all the benefits

conferred and be subject to all obligations imposed upon the Lessee under the terms of this instrument with the same effect as if such assignee were to the extent of the property assigned the original contracting party; provided, however, that no pledgee or mortgagee shall be obligated to perform any of the covenants of this lease unless and until such pledgee or mortgagee shall have acquired possession of the leasehold premises or shall operate or control the same; provided, further, that no such assignment, sub-lease, pledge or mortgage shall be made unless The New York, New Haven and Hartford Railroad Company, mentioned in the agreement hereto appended, shall first in writing consent that the same shall be made and agree that its obligations under said agreement shall not in anywise be diminished thereby; and provided, further, that no such assignment, sub-lease, pledge or mortgage shall in any way impair or diminish the obligations of the Lessee hereunder.

It is covenanted and agreed between the Lessor and Lessee that a certain portion of the rentals hereinbefore agreed to be paid by the Lessee to the Lessor, to wit, the annual sum of six hundred and seventy-three thousand eight hundred and eighty-two dollars ($673,882), is intended solely to provide for the payment of interest on bonds and payments into sinking fund, as set forth in said Schedule B, and that if the aggregate amount of the payments due from the Lessor for sinking fund and interest on bonds shall in any year hereafter be less than said sum above named, then and in such case the annual rentals to be paid by the Lessee to the Lessor shall be correspondingly diminished so as not to alter the amount of the balance of rental to be paid to the Lessor for other purposes than for such interest and sinking fund payments. It is further covenanted and agreed between the Lessor and the Lessee that such portion of the rentals paid to the Lessor

by the Lessee under this lease as shall be applied to payments into such sinking fund, with all accumulations of interest thereon, shall create a claim of the Lessee upon the Lessor for the entire contents of the sinking fund, at the date of payment of the bonds, to be liquidated at the time when, under the provisions of said sinking fund agreement described in said Schedule B, the bonds in said sinking fund are to be cancelled, and that at such time, and in connection with the delivery to the Lessee by the Lessor of new bonds in substitution for previously existing bonds of the Lessor then to be paid by the Lessee, and on condition that the Lessee shall fulfill its covenants in relation to the payment of the bonds of the Lessor then to be paid by the Lessee, the Lessor will issue and deliver to the Lessee bonds for the principal amount of said claim, which the Lessee agrees to accept in satisfaction thereof, such bonds to be of the same form and secured in the same way and to be part of the same issue as are such new bonds then to be issued by the Lessee, as hereinbefore provided.

The Lessee covenants that it will keep the property from time to time subject to this lease reasonably insured at the expense of the Lessee against loss or damage by fire to the extent that the property of similar companies is usually insured, in good and solvent companies—such insurance to be taken in the name of the Lessee, and the proceeds thereof when received by the Lessee to be placed in a separate fund to be applied by the Lessee solely to the rebuilding, replacement or repair of the property damaged or destroyed whenever necessary or desirable for the operation of the leased property, or when not so necessary or desirable, then to other additions, extensions, betterments and renewals of property subject to this lease; provided, however, that the Lessee may adopt such other plan or method of protection against loss by fire, whether by the establishment of an insurance fund or otherwise,

as may be approved by the Board of Directors of the Lessor. It is understood and agreed, however, that the Lessee will at all times comply with the insurance clause contained in any existing mortgages described in Schedule B or in any mortgages hereafter made by the Lessor in accordance with the provisions of this lease. In case of any failure on the part of the Lessee to keep said property so insured or protected from loss by fire, it shall be lawful for the Lessor to cause said property to be insured, and the Lessor may recover the amount of any payments of premiums for such insurance, with interest thereon from the date thereof, from the Lessee, without prejudice to any other right or remedy secured to the Lessor by this lease for breach of any covenants thereof.

The Lessor represents that the shares of stock enumerated in Schedule F have been delivered to the Colonial Trust Company, of New York City, under and subject to the provisions of a certain agreement made between the Lessor and said Trust Company, dated January 23, 1901, referred to in Schedule B, and agrees that when said shares shall be delivered back to it by said Trust Company, it will retain its ownership, possession and control of all of the same during the term of this lease, and that it will from time to time, upon the demand of the Lessee, cause proper proxies to be executed and delivered to the Lessee or to its appointees, so that any voting power vested in the Lessor as to all of said shares of stock shall be exercised by the Lessee, its successors or assigns, or such appointees. Such voting power shall at no time be given, used or exercised by the Lessee, its successors or assigns, or by such appointees, to permit or authorize any mortgage or other lien to be created upon any of the properties of the corporations whose shares of stock are referred to in this section, nor to permit the creating of any floating indebtedness by any of said corporations, nor to in

any way impair the title to or value of the demised property, nor to threaten its integrity, nor shall said shares be voted in any way inconsistent with the true intent and meaning of this lease. It is agreed that whenever the Board of Directors of the Lessor and the Board of Directors of the Lessee shall each by proper vote authorize the cancellation and destruction of any of said stock the same may be cancelled and destroyed. 73

The Lessor represents that the shares of stock of The Roton Point Improvement Company enumerated in Schedule G have been delivered to the Colonial Trust Company under and subject to the provisions of a certain mortgage between the Connecticut Railway and Lighting Company and the Colonial Trust Company, Trustee, dated January 15, 1901. The Lessor covenants that it will retain the ownership of said shares of stock during the continuance of this lease, and that it will, from time to time, cause proper proxies to be executed and delivered to the Lessee or to its appointees so that the voting power vested in the Lessor as to all of said shares of stock shall be exercised by the Lessee, its successors or assigns, or such appointees. Such voting power shall at no time be given, used or exercised by the Lessee, its successors or assigns, or by such appointees to permit an increase in the capital stock of said company or any lien, security or charge to be created or imposed upon the property or franchises of said company, nor shall said shares be voted in any way inconsistent with the true intent and meaning of this lease; provided, however, that if the Lessee should at any time during the continuance of this lease desire that the property of said The Roton Point Improvement Company be conveyed to the Lessor, as permitted by subdivision (3) of Article I of said mortgage, the Lessee shall, through its Board of Directors, call in writing upon the Board of Directors of the Lessor to take action in the manner pro- 74 75

76 vided by said mortgage to cause the property of The Roton Point Improvement Company to be conveyed to the Lessor, which action the Lessor agrees to promptly take. In the event that such conveyance be made, proceedings shall be taken at once, at the sole expense of the Lessee, to dissolve said The Roton Point Improvement Company, in accordance with law. Upon such dissolution the shares of stock of said company shall be delivered to the Lessor and be by it cancelled.

If the Lessee shall at any time fail to pay the interest
77 upon bonds and to make the sinking fund payments, as hereinbefore provided, or if the Lessee shall fail for thirty (30) days to make any quarterly payment of the balance of said rental, as stipulated in this agreement, or to pay the taxes and charges levied upon the demised property, unless the payment of such tax or charge is resisted by legal proceedings taken before any sale or alienation of said demised premises takes place by reason of such non-payment, then and in any such case this lease shall expire and terminate at the option of the Lessor, and the Lessor may thereupon re-enter upon the demised premises as an entirety and notwithstanding any assignment, pledge or
78 mortgage of this lease, or any rights thereunder, and the same have and possess as of its former estate, without prejudice to its right of action for arrears of rent or breach of covenant.

If the Lessee shall fail to keep and perform any other of its covenants and agreements in this lease contained, and such default shall continue for ninety (90) days after written notice thereof shall have been given by the Lessor to the Lessee, then and in any such case this lease shall expire and terminate at the option of the Lessor, unless within said period of ninety (90) days the Lessee shall deny in writing that the acts complained of constitute a default under the lease and shall request a reference of the ques-

tions in dispute to arbitration, and shall, at the same time, in writing, appoint an arbitrator on its behalf; thereupon the Lessor shall also appoint an arbitrator, and to the two so appointed the questions in dispute shall be submitted for final conclusion. If the two thus appointed cannot agree, they shall either promptly select a third person, making three arbitrators, or, if they fail to make such selection, it may be made by the Chief Justice of the Supreme Court of Connecticut, by the request of either party, upon reasonable notice first given to such other party, and the conclusions of this arbitration shall be final and binding upon the parties as to the matters submitted. If the Lessee shall not make any request for arbitration, this lease shall, at the option of the Lessor, expire and terminate, and the Lessor may thereupon re-enter upon the demised premises as an entirety and notwithstanding any assignment, pledge or mortgage of this lease, or any rights thereunder, and the same have and possess as of its former estate, without prejudice to its right of action for arrears of rent or breach of covenant; but if the Lessee shall request such arbitration, and if, upon the award of such arbitrators, the contention of the Lessor shall be sustained, then, unless the Lessee shall, within ninety (90) days thereafter, proceed to remedy such default and prosecute such remedy to completion with all reasonable despatch, the Lessor may re-enter and repossess said premises without prejudice as aforesaid.

Except as otherwise expressly provided, the rights and duties arising from this instrument shall inure to and be binding upon the respective successors and assigns of the Lessor and Lessee.

Schedules A, C, D, E, F, G and 1, and the inventory herein referred to shall not be attached to this lease, but shall be made in duplicate and shall be marked for identification with the signatures of the presidents of both the

82 *Exhibit A, Annexed to Proof of Claim.*

Lessor and Lessee corporations, under the seals thereof, and one copy thereof retained by each party.

IN WITNESS WHEREOF, the parties hereto, under the authority and direction of their respective Boards of Directors, have caused this instrument to be signed by their respective Presidents and their corporate seals to be hereto affixed, this 19th day of December, A. D. 1906.

CONNECTICUT RAILWAY AND LIGHTING COMPANY,

83 By

ALDEN M. YOUNG

[SEAL] President.

THE CONSOLIDATED RAILWAY COMPANY,

By

CHARLES S. MELLEN

[SEAL] President.

Witnesses as to all signatures:

84 EDWARD G. BUCKLAND.
H. A. FABIAN.

STATE OF CONNECTICUT, }
County of New Haven, } ss.:

NEW HAVEN, December 19th, 1906.

Then personally appeared before me ALDEN M. YOUNG, President of the Connecticut Railway and Lighting Company, and CHARLES S. MELLEN, President of The Consolidated Railway Company, and severally acknowledged

the foregoing instrument, executed by them for and in behalf of said companies and under the authority granted to them by vote of the directors of said companies, to be the free act and deed of the said Connecticut Railway and Lighting Company and said The Consolidated Railway Company.

HARRY A. FABIAN
Notary Public.

[SEAL]

The New York, New Haven and Hartford Railroad Company, a corporation existing under the laws of the State of Connecticut, being the owner of record of nearly all the shares of the capital stock of The Consolidated Railway Company, the Lessee in the foregoing lease, and the said lease being made on the condition that the performance of the covenants therein shall be guaranteed by said The New York, New Haven and Hartford Railroad Company:

Now, therefore, for value received, and in consideration of the making of the foregoing lease, said The New York, New Haven and Hartford Railroad Company guarantees that the rentals therein agreed to be paid and all the terms and conditions thereof shall be fully and faithfully paid, kept and performed by the Lessee, its successors and assigns, according to the terms and tenor thereof, and in case of default in the payment of said rentals, The New York, New Haven and Hartford Railroad Company agrees to pay the same on demand.

Said The New York, New Haven and Hartford Railroad Company further agrees that if at any time hereafter it shall take an assignment to itself of the said lease, or if the same shall fail for any reason to be operative, it will forthwith be taken to have assumed the position of Lessee, and will perform all the obligations thereof with the same force and effect as if the same had been made to it as Lessee directly.

85

86

87

88 *Exhibit A, Annexed to Proof of Claim.*

IN WITNESS WHEREOF, The New York, New Haven and Hartford Railroad Company, under the authority and direction of its Board of Directors, has caused this instrument to be signed by its President and its corporate seal to be hereto affixed this 19th day of Dec'r A. D. 1906.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

By

CHARLES S. MELLEN
President.

89 [SEAL]

Witnesses:

EDWARD G. BUCKLAND.
H. A. FABIAN.

STATE OF CONNECTICUT, }
County of New Haven, } ss.:

NEW HAVEN, December 19th, 1906.

90 Then personally appeared before me CHARLES S. MELLEN, President of The New York, New Haven and Hartford Railroad Company, and acknowledged the foregoing instrument executed by him for and in behalf of said company and under the authority granted to him by vote of the directors of said company, to be the free act and deed of the said The New York, New Haven and Hartford Railroad Company.

[SEAL]

HARRY A. FABIAN
Notary Public.

ORDER No. 214. 91

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF CONNECTICUT

IN PROCEEDINGS FOR THE REORGANIZATION OF A RAILROAD

IN THE MATTER of THE NEW YORK, NEW HAVEN and HARTFORD RAILROAD COMPANY, Debtor.	No. 16562

92

ORDER No. 62.

IN PROCEEDINGS FOR THE REORGANIZATION OF A CORPORATION

IN THE MATTER of THE CONNECTICUT COMPANY, Debtor.	No. 16587

93

Order Upon Claims of Connecticut Railway and Lighting Company.

The claims of Connecticut Railway and Lighting Company against The New York, New Haven and Hartford Railroad Company and The Connecticut Company in the

94 *Order Upon Claims of Connecticut Railway and Lighting Company.*

above- entitled proceedings having come on for hearing and the Court having considered the facts and arguments presented and having issued its Memorandum of Decision dated September 1, 1937 and due notice of the settlement of this order to give effect to said decision having been given, it is

ORDERED, ADJUDGED AND DECREED:

95 1. For damage or injury to Connecticut Railway and Lighting Company accrued to June 30, 1937 resulting from the rejection on December 18, 1935 by said The New York, New Haven and Hartford Railroad Company and the Trustees of its property of the lease dated December 19, 1906 between said Connecticut Railway and Lighting Company and The Consolidated Railway Company, there is hereby allowed as a common claim but only against the estate of said The New York, New Haven and Hartford Railroad Company the amount of $1,263,412.92, with leave to said Connecticut Railway and Lighting Company to apply, within such time as may be hereafter fixed by this
96 Court in the proceedings of said The New York, New Haven and Hartford Railroad Company for final hearing upon lease claims, for a supplemental hearing to liquidate any damage or injury to said Connecticut Railway and Lighting Company from such rejection which may accrue from July 1, 1937 to the date of said final hearing. This item of claim against The Connecticut Company is hereby wholly disallowed.

2. The Court finds that rental stipulated in said lease, accrued and unpaid on October 31, 1935, amounted to $304,472.13. Said amount is hereby allowed as a common claim against the estate of each of the aforesaid Debtors,

97

provided, however, that Connecticut Railway and Lighting Company shall not receive satisfaction of said claims in excess of said amount.

3. The Court finds that taxes assessed against Connecticut Railway and Lighting Company, payable by the lessee under said lease, proved to have become payable prior to December 18, 1935 and unpaid by either of the aforesaid Debtors, amounted to $27,858.75. Said amount is hereby allowed as a common claim against the estate of each of said Debtors, provided, however, that Connecticut Railway and Lighting Company shall not receive satisfaction of said claims in excess of said amount.

98

4. The item of claim for damage for breach of covenant in the abandonment without written consent of Connecticut Railway and Lighting Company of a trolley line on Arch Street, New Britain, is disallowed as a claim against either estate.

5. All claims against either of said Debtors for deficiencies in the property repossessed by Connecticut Railway and Lighting Company are hereby disallowed except that the Court finds that pursuant to Order No. 20 entered May 18, 1936 in the reorganization proceedings of The Connecticut Company, said Debtor paid an aggregate of $173,537.35 as principal and interest due on conditional bills of sale covering 46 busses which in the following November were turned over to Connecticut Railway and Lighting Company and that said payments were proper offsets to the claim of said Company against the estate in administration. The aggregate amount of said payments, viz., $173,537.35 is hereby allowed as a common claim against the estate of each of said debtors, provided, how-

99

100 ever, that Connecticut Railway and Lighting Company shall not receive satisfaction of said claims in excess of said amount.

6. The Court finds that subject to the jurisdiction of the Connecticut Public Utilities Commission, Connecticut Railway and Lighting Company is entitled to repossess and operate portions of disputed bus lines as follows:

101 (a) New Haven-Bridgeport route, via Milford Turnpike, designated as Route No. 1 in Claimant's Exhibit 36—So much of said route as lies west of the Orange-West Haven Town Line.

(b) Hartford-New Britain route, via West Hartford designated as Route No. 2 in Claimant's Exhibit 37—So much of said route as lies south of the Newington-West Hartford Town Line.

(c) Special bus line for tobacco workers, New Britain-Hartford, designated as Route No. 3 in Claimant's Exhibit 37—So much of said route as lies within the Town of New Britain.

102 (d) Stamford-Darien Railroad Station route designated as Route No. 5 in Claimant's Exhibit 39—So much of said route as lies within the Town of Darien.

The Court further finds that Connecticut Railway and Lighting Company is entitled to four additional busses of 30 passenger capacity for the operation of the portions of lines herein awarded and to an accounting of the net revenues received by The Connecticut Company from operation of said portions since November 16, 1936. The Connecticut Company is hereby ordered, subject to the jurisdiction of the Connecticut Public Utilities Commission, to surrender to Connecticut Railway and Lighting Com-

103

pany the portions of lines herein awarded together with four busses as aforesaid for their operation and within sixty days of the date of said surrender to account to Connecticut Railway and Lighting Company for the net revenue from operation of said portions between November 16, 1936 and said date of surrender. Within ninety days from said date of surrender the parties shall report to this Court the extent to which they are in agreement as to the correctness of said accounts and the matters, if any, as to which they are not in agreement in order that the Court may adjudicate as to the said accounts and may determine what sum, if any, is payable to Connecticut Railway and Lighting Company by reason of the operation of its said property.

104

Claim for the eastern extremity of the Stamford-Darien route designated as Route No. 6 in Claimant's Exhibit 39 is hereby disallowed.

Claim for ten parcels of real estate have been severed by agreement of the parties and are not dealt with herein.

7. The claim against The Connecticut Company for rejection of an alleged contract to become a tenant of Connecticut Railway and Lighting Company is hereby disallowed.

105

8. The Court finds that there remains due after valid credits as compensation to Connecticut Railway and Lighting Company for use of its property from October 31, 1935 to November 16, 1936 the amount of $151,243.73 (consisting of stipulated rent from November 1 to December 18, 1935 of $138,024.73, proved taxes and fire insurance for the same period of $1,168.65, and net earnings from December 18, 1935 to November 16, 1936 of $333,227.70, less advances and credits of $321,177.35). This amount, namely $151,243.73, is hereby allowed against The Connecticut

Company as an operating expense of the estate of said Company in administration.

9. All other claims whatsoever of Connecticut Railway and Lighting Company against either of the aforesaid Debtors are hereby wholly disallowed.

10. The counterclaims to a right in the sinking fund of Connecticut Railway and Lighting Company are hereby dis-
107 allowed.

11. The counterclaims to the alleged cost or value of extensions made to Connecticut Railway and Lighting Company property are hereby disallowed.

Enter:

C. C. HINCKS,
District Judge.

Dated: Sept. 27, 1937.

108

Order No. 214A. 109

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF CONNECTICUT

IN PROCEEDINGS FOR THE REORGANIZATION OF A RAILROAD

IN THE MATTER of THE NEW YORK, NEW HAVEN and HARTFORD RAILROAD COMPANY, Debtor.	No. 16562

110

Order on Mandate on Claims of Connecticut Railway and Lighting Company.

The claimant, Connecticut Railway and Lighting Company, and Messrs. Howard S. Palmer, James Lee Loomis and Henry B. Sawyer, Trustees of the property of The New York, New Haven and Hartford Railroad Company, the Principal Debtor herein, both having appealed to the Circuit Court of Appeals for the Second Circuit from the Order of this Court (No. 214) made and entered herein on September 27, 1937, and the said Circuit Court of Appeals having thereupon rendered its decision modifying the said Order in accordance with the opinion of the said Court, and, as so modified, affirming the said Order with costs to the claimant and having delivered its mandate to this Court, 111

112 *Order on Mandate on Claims of Connecticut Railway and Lighting Company.*

which mandate is on file with the Clerk of this Court, and claimant having moved for a settlement of the order on mandate, and due notice of the settlement of this order having been given, it is

ORDERED, ADJUDGED AND DECREED as follows:

(1) The said mandate be, and it hereby is, made the order and judgment of this Court;

113 (2) For damage or injury to claimant accrued from December 18, 1935 to June 30, 1937 resulting from the rejection by said Debtor and the Trustees of its property of the Lease dated December 19, 1906 between Claimant and The Consolidated Railway Company, there is hereby allowed as a common claim against the estate of said Debtor, the amount of $1,263,412.92, with leave to claimant to apply, within such time as may hereafter be fixed by this Court in the above-entitled proceedings, for final hearing upon its lease claims to liquidate; (1) any damage or injury to claimant from such rejection which may accrue from July 1, 1937 to the date of said final hearing; and (2) to liquidate its
114 damages for the breach of the tax-free covenant contained in the lease for the period from December 18, 1935 (when said lease was rejected) to date of final hearing, provided however its claim heretofore pressed for the period between December 18, 1935 and June 30, 1937 for such damages in the amount of $154,759.03 computed upon the basis of the full rental stipulated in the lease is hereby disallowed;

(3) The amount of $388,282.83 representing unpaid rental of $281,900.88 and $106,381.95 on account of taxes is hereby allowed as a common claim against the estate of the said Debtor;

Order on Mandate on Claims of Connecticut Railway and Lighting Company.

(4) The amount of $413,376.33 allowed to claimant as a common claim against the estate of The Connecticut Company in Docket No. 16587 shall be deducted from the foregoing allowances; 115

(5) The claim for deficiencies in the property repossessed by Claimant is hereby allowed as a common claim against the estate of said Debtor in the sum of $173,537.35;

(6) Claim for ten parcels of real estate have been severed by agreement of the parties and are not dealt with herein; 116

(7) Except as above decreed, all claims of claimant against said Debtor, and all counterclaims of the said Debtor or its Trustees against said claimant heretofore filed in these proceedings are hereby wholly disallowed;

(8) The claimant shall recover of the said Trustees of the property of said Debtor the sum of $3,083.57 as and for the costs awarded by the mandate of the Circuit Court of Appeals, said amount to be forthwith paid to claimant by the said Trustees as an expense of administration herein. 117

Enter:

C. C. HINCKS,
United States District Judge.

Dated: September 30, 1938.

118 IN THE

DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF CONNECTICUT

IN PROCEEDINGS FOR THE REORGANIZATION OF A RAILROAD

IN THE MATTER OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Debtor.	No. 16562

119

Petition of trustees of the property of the principal debtor for modification of Order No. 214A on claims of Connecticut Railway and Lighting Company.

Now come Howard S. Palmer, James Lee Loomis and Henry B. Sawyer, Trustees of the property of the Principal Debtor herein, and respectfully represent:

120

1. On motion of the Connecticut Railway and Lighting Company (hereinafter called C. R. & L.) for entry of a final order on its claims against the estate of the Principal Debtor, this Court on September 30, 1938 entered its Order (No. 214A) on Mandate of the Circuit Court of Appeals. No appeal was taken by any party from the said Order

No. 214A, and the time for appealing therefrom has now elapsed. 121

2. C. R. & L. had previously, on May 28, 1938, without seeking a stay of mandate, filed with the Supreme Court of the United States a petition for certiorari as to certain issues dealt with in the mandate of the Circuit Court of Appeals. The said petition for certiorari was granted on October 10, 1938. The matter was argued before the Supreme Court on November 10 and 14, 1938 and was decided by that court on January 3, 1939. 122

3. The substance of the Supreme Court's decision is shown in the following excerpt therefrom:

> "As certiorari was sought and allowed only upon so much of the order of the Circuit Court of Appeals as affected the measure of the lessor's damage for rejection of the lease in question, the order of that court is reversed only in that particular and this case is remanded to the District Court for further proceedings in accordance with the order and opinion of the Circuit Court of Appeals as herein modified and of this Court." 123

4. The Supreme Court held that Section 77 of the Bankruptcy Act does not impose any "definite formula" or "exact measure" of damages for rejection of a lease in railroad reorganizations, but does "call emphatically to the attention of those administering the reorganization section the requirement that only those damages susceptible of definite proof should be allowed."

The Supreme Court further said:

Petition of trustees of the property of the principal debtor for modification of Order No. 214A on claims of Connecticut Railway and Lighting Company.

"Judges in equitable proceedings will have the advantage of evidence in applying the usual rules as to the measure of damages. It is well understood that such evidence must show damages to reasonable certainty. Mere 'plausible anticipation' does not merit consideration nor are flights into the realm of pure speculation entitled to be treated as evidence. The determination of the amount to be allowed as the damage will be based on evidence which satisfies the mind."

The Supreme Court said that the measure of damages applicable in such a case is:

"* * * the present value of the rent reserved less the present rental value of the remainder of the term."

5. Hearings were held by this Court on the C. R. & L. claims starting June 30, 1937. The parties were given full opportunity to present evidence on the issue of damage for rejection of the lease. No evidence offered on that issue by C. R. & L., was excluded.

6. The only evidence presented by C. R. & L. bearing upon damage for rejection of the lease was a statement as to the amount of rent payable in 1935 and the earnings of the demised property for the year ended October 31, 1936.

The record also contains the lease, full information concerning the sinking fund for the lessor's bonds and the following facts relating to the demised property; that C. R. & L. repossessed a large part of it on November

127

16, 1936; that it had consisted in part of trolleys and in part of busses prior to that time but that the trolley service was entirely abandoned and converted into bus service shortly thereafter; and that following such conversion, the amount and profitableness of the business increased. There is no other evidence relating to either "the present value of the rent reserved" or "the present rental value of the remainder of the term."

128

7. The lease shows that approximately one-half of the rent payable in 1935 was for the purpose of paying interest on the lessor's bonds, both those outstanding and those held in the sinking fund, and making payments into the sinking fund; that rent would have continued at that annual rate only so long as any of the lessor's bonds remained outstanding outside of the sinking fund; and that at or shortly after the maturity of the said bonds in 1951 the rent would have been cut substantially in half and thereafter would have been at the annual rate of $544,588.50. There is no evidence of rental value. Net earnings for the year ended October 31, 1936 from the portion of the property repossessed on November 16, 1936 were shown to be approximately $229,000. Earnings were not shown for any later period. The record contains no evidence as to the present or future value of the use of money or the rate at which rent or rental value should be discounted for the future.

129

8. On the basis of the record it is impossible to determine with "reasonable certainty" the "present rental value of the remainder of the term" or to find that it may not exceed "the present value of the rent reserved."

130 *Petition of trustees of the property of the principal debtor for modification of Order No. 214A on claims of Connecticut Railway and Lighting Company.*

9. In paragraph (2) of Order No. 214A certain damages were awarded to C. R. & L. for rejection of the lease. In the light of the Supreme Court's interpretation of the statutes, such damages have not been proved by "evidence which satisfies the mind". Said paragraph of the order is therefore erroneous and should be vacated, and C. R. & L.'s. claim for damages for loss of future rent on rejection of its lease should be disallowed.

131

WHEREFORE, the petitioners respectfully ask that an order be entered vacating Paragraph (2) of Order No. 214A and disallowing C. R. & L's. claim for damage for loss of future rent on rejection of its lease.

Respectfully submitted,

HERMON J. WELLS,
JAMES GARFIELD,
Attorneys for Petitioners.

132 Dated: January 11, 1939.

Affidavit in Opposition to the Petition of the Debtor for Modification of Order No. 214-A. 133

UNITED STATES DISTRICT COURT,

DISTRICT OF CONNECTICUT.

IN THE MATTER OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Debtor.	In Proceedings for the Reorganization of a Railroad, No. 16,562. 134

State of New York, County of New York, } ss.:

George W. Martin being duly sworn, deposes and says that he is counsel for CONNECTICUT RAILWAY AND LIGHTING COMPANY, the Claimant herein. 135

The petition of the Trustees of the Debtor asks that Paragraph (2) of Order No. 214-A be vacated and the claims of C. R. & L. for damages for loss of future rent on rejection of its lease to the Debtor should be disallowed. The facts are as follows:

C. R. & L. was the landlord of the New Haven.

It duly filed a claim against the New Haven, and the claim was brought on for a hearing before the District Court on June 30, 1937.

136 *Affidavit in Opposition to the Petition of the Debtor for Modification of Order No. 214-A.*

IN THE DISTRICT COURT.

On the hearing in the District Court, evidence was given on a variety of items in the claim, including claims for rent accrued to petition filed, damages for the rejection of the lease, taxes, failure to compete, deficiencies in property returned, compensation for use and occupation, reclamation of certain bus routes, and also on certain counterclaims and set-offs pleaded by the New Haven. The lease with C. R. & L. had been rejected by the Trustees
137 of the New Haven as of December 18, 1935, and the property had been surrendered to C. R. & L. on November 16, 1936. A full year of operation by the New Haven's subsidiary since the filing of the petition was therefore available in order to ascertain the rental value of the property. This period was November 1, 1935 to October 31, 1936, and The Connecticut Company's books showed that the net operating income for that year was $229,062.40. The stipulated annual rental as fixed by the lease was $1,049,563.50. Thus, the basic annual damages were $1,049,563.50 minus $229,062.40, or $820,501.10. This annual damage
138 was prorated by the District Court over the period from rejection of the lease (December 18, 1935), to the date of hearing (June 30, 1937), amounting to eighteen months and thirteen days, and for this period the District Court allowed as damages for the rejection of the lease $1,263,412.92 (Order No. 214).

The District Court further ruled that, under the provisions of §77 of the Bankruptcy Act, the only damages provable by C. R. & L. must be based on rent which would have accrued under the lease up to June 30, 1937, the date of the hearing. The District Court further gave "leave

139

to said Connecticut Railway and Lighting Company to apply, within such time as may be hereafter fixed by this Court in proceedings of said The New York, New Haven and Hartford Railroad Company for final hearing upon lease claims, for a supplemental hearing to liquidate any damage or injury to said Connecticut Railway and Lighting Company from such rejection which may accrue from July 1, 1937 to the date of said final hearing".

Both the Debtor and C. R. & L. appealed.

140

IN THE C. C. A.

The Circuit Court of Appeals affirmed all the dispositions of the issues made by the District Court, with the exception of the ruling on the issue raised by the existence of the tax-free covenant in the lease. Referring to this covenant, the C. C. A. said:

> "These words make it clear that the landlord should have the rental tax-free * * *. The claimant's Federal income tax must be added in calculating the amount realized on the claim for the period between rejection of the lease and the date of hearing before the court below."

141

A difference of opinion arose with regard to the meaning of the C. C. A. in this respect between the New Haven and the C. R. & L. C. R. & L. urged, in making the calculation of the damages, the value of the stipulated rental as tax-free dollars must be taken into consideration and added to the minuend from which the rental value was to be substracted in order to ascertain the net damages. The New Haven claimed that the C. C. A. meant only that in-

142 come tax actually paid by C. R. & L. on the operating income from the surrendered property should be subtracted from the subtrahend, or net income, in ascertaining the net damages.

On the return of the mandate of the C. C. A. to the District Court, the District Court made an order, No. 214-A, granting leave to C. R. & L. to apply for a further hearing on its lease claims as before and, further, "to liquidate its damages for the breach of the tax-free covenant contained in the lease for the period from December 18, 1935 (when 143 said lease was rejected), to date of final hearing".

Both parties then appealed to the Supreme Court.

IN THE SUPREME COURT.

The petition for writ of certiorari by the New Haven was denied.

The petition for writ of certiorari by C. R. & L. was granted "only upon so much of the order of the Circuit Court of Appeals as affected the measure of the lessor's damage for rejection of the lease in question".

144 On the hearing before the Supreme Court, the order of the C. C. A. "is reversed only in that particular and this case is remanded to the District Court for further proceedings in accordance with the order and opinion of the Circuit Court of Appeals, as herein modified and of this Court".

The Supreme Court said:

> "We cannot read a limitation on damages into the language as enacted * * * the measure was the present value of the rent reserved, less the present value of the remainder of the term."

Affidavit in Opposition to the Petition of the Debtor for Modification of Order No. 214-A. 145

On reading the opinion of the Supreme Court, it is evident that they intended to modify the dispositions below only by deleting the limitation of the landlord's damages for rejection to damages which had accrued at hearing and to substitute for this limitation the usual rule for damages on anticipatory breach of contracts. The removal of this date limitation (i. e., the date of the final hearing on the claim contemplated and prescribed by the courts below), did not in any way modify any of the other provisions in the orders or decrees of the courts below, but the 146
further proceedings in the District Court were to be in accordance with the order and opinion of the Circuit Court of Appeals with this single modification.

It follows, therefore, that inasmuch as the opinion of the District Court and the opinion and mandate of the C. C. A. and the orders of the District Court No. 214 and No. 214-A, all provide for a further hearing before the District Court in order to take testimony with regard to damages or injury to C. R. & L. from the rejection of the lease which may accrue from July 1, 1937, these dispositions have been approved and affirmed by the Supreme 147
Court, and should now be followed out. Not only is this the logical conclusion to be drawn from the opinion of the Supreme Court, but, on a reading of the opinion, it is obvious that the Supreme Court contemplated that a further hearing should be held by the District Court where "the determination of the amount to be allowed as the damage will be based on evidence which satisfies the mind".

IN CONCLUSION.

C. R. & L. prays that the District Court will make an order directing that a hearing be had at which C. R. & L.

148 *Affidavit in Opposition to the Petition of the Debtor for Modification of Order No. 214-A.*

may give evidence as to its damages from the rejection of the lease which have accrued since July 1, 1937, and evidence with regard to its damages for the breach of the tax-free covenant contained in the lease which have accrued since December 18, 1935. The damages for rejection of the lease which accrued in the period between December 18, 1935 and June 30, 1937, which have already been allowed in the sum of $1,263,412.92, should stand as allowed for the damages proved for that period (with the exception of damages flowing from breach of the tax-free cove-
149 nant). The rental value of the property and the stipulated rent have already been proved for the period between rejection (December 18, 1935), and the date of the first hearing (June 30, 1937), and there is no point in proving them again.

The statements in the petition: "On the basis of the record, it is impossible to determine with reasonable certainty the present rental value of the remainder of the term or to find that it may not exceed the present value of the rent reserved", are challenged. All of the facts with regard to the calculation of the present rental value of the
150 term are in the record. The only facts necessary are the stipulated annual rental, amounting to $1,049,563.50, and the length of the balance of the term, which is 969 years. From these data, it is a mere matter of calculation to estimate the present rental value of the remainder of the term. Furthermore, it is quite obvious that the present rental value does not exceed the present value of the rent reserved, because the Trustees of the New Haven, when they rejected the lease, must have come to this conclusion themselves, and the District Court must have been satisfied of

Affidavit in Opposition to the Petition of the Debtor for Modification of Order No. 214-A. 151

it or it would not have permitted the rejection of the lease. It is unreasonable, therefore, to say that there is no evidence of damage. Not only is there obvious evidence of damage, but the damages have actually been proved up to June 30, 1937, and it only remains to give evidence as to the damage accruing since that date.

The petition, therefore, should be denied.

GEORGE W. MARTIN

152

Sworn to before me, this 18th day of January, 1939.

MARGARET WEAVER
Notary Public, N. Y. Co. No. 344
New York County Reg. No. O.W.444
Commission Expires March 30, 1940.

153

154 IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF CONNECTICUT

IN PROCEEDINGS FOR THE REORGANIZATION OF A RAILROAD

IN THE MATTER OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Debtor.	No. 16562

155

Order on Petition of Trustees of the Property of the Principal Debtor for Modification of Order No. 214A.

156 The petition of the Trustees of the property of the Principal Debtor for modification of Order No. 214A on claims of Connecticut Railway and Lighting Company having come on for hearing which was duly noticed, and counsel for the claimant having filed his affidavit sworn to January 18, 1939 in opposition to said petition, and all parties having been heard or given opportunity to be

Order on Petition of Trustees of the Property of the Principal Debtor for Modification of Order No. 214A. 157

heard, and the Court being fully advised in the premises, it is ORDERED:

Petition is denied. A rehearing is appointed for Monday, March 13, 1939 at 11:00 A. M., at which the record may be reopened and further proof offered of claimant's damages for rejection of its lease.

ENTER:

C. C. HINCKS 158
District Judge.

Dated: January 24, 1939.

159

160 Order No. 214-B.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF CONNECTICUT

IN PROCEEDINGS FOR THE REORGANIZATION OF A RAILROAD

161 IN THE MATTER

OF

THE NEW YORK, NEW HAVEN and HARTFORD RAILROAD COMPANY,

Debtor.

No. 16562

Order to correct and revise Order No. 214-A on claims of Connecticut Railway and Lighting Company and to make additional allowance under tax free covenant.

162 This Court on September 30, 1938 having entered its order (No. 214-A) on the mandate of the Circuit Court of Appeals for the Second Circuit on the claim of Connecticut Railway and Lighting Company against the Principal Debtor herein, and the Supreme Court of the United States on January 3, 1939 having reversed so much of the order of said Circuit Court of Appeals as affected the measure of damages for rejection of the lease dated December 19, 1906, between Claimant and The Consolidated Railway Company and accordingly having remanded the case to this Court for further proceedings, and said further proceed-

Order to Correct and Revise Order No. 214-A on Claims of Connecticut Railway and Lighting Company and to Make Additional Allowance Under Tax-Free Covenant.

163

ings having been had on this issue and on the liquidation of Claimant's damages under the tax free covenant of said lease, said liquidation having been reserved in said Order No. 214-A, and additional evidence having been taken, arguments presented and briefs filed and this Court having entered its memorandum of decision dated June 21, 1939, and due notice of the settlement of this order having been given, it is

164

ORDERED, ADJUDGED AND DECREED:

1. That paragraph 2 of said Order No. 214-A be and it is hereby corrected and revised by striking out the allowance in the amount of $1,263,412.92 for Claimant's damages from the rejection of the lease accruing from December 18, 1935 to June 30, 1937 (the date of the original hearing) and also by striking out the provision of said paragraph for liquidation of such damages accruing up to the date of final hearing.

2. For damage or injury to the Claimant for breach of the tax-free covenant of the lease the amount of $29,037.41 be and it hereby is allowed as a common claim against the estate of said Debtor.

165

Enter:

C. C. HINCKS
District Judge.

Dated: Sept. 13, 1939.

166 **Minutes of Hearings.**

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF CONNECTICUT

IN PROCEEDINGS FOR THE REORGANIZATION OF A RAILROAD

IN THE MATTER of 167 THE NEW YORK, NEW HAVEN and HARTFORD RAILROAD COMPANY, Debtor.	No. 16562

MINUTES OF HEARING HELD ON MARCH 13, 1939 AT 11:00 A. M., ON CLAIMS OF CONNECTICUT RAILWAY AND LIGHTING COMPANY.

Before:

168 HONORABLE CARROLL C. HINCKS,
District Judge.

APPEARANCES:

For the Trustees of the Property of the Principal Debtor
JAMES GARFIELD, ESQ.,
H. J. WELLS, ESQ.

For Connecticut Railway and Lighting Company
GEORGE W. MARTIN, ESQ.,
THOMAS B. FENLON, ESQ.

Hincks, J.: In the matter of The New Haven Railroad.

Mr. Martin: If your Honor please, at this hearing the Connecticut Railway and Lighting Company proposes to prove its damages for rejection of its lease by the Trustees of the New Haven Railroad. The lease was a lease of trolley properties, and at the time of the rejection, which was December 18, 1935, the lease had 969 years to run. At that time, the stipulated rent amount to $1,049,563.50 annually.

I represent the C. R. & L. What I propose to do is to prove the present value of this stipulated rental, discounted over the balance of the term. I do not propose to prove it for 969 years, because I think that it would be impossible to satisfy the mind of the Court that evidence for so long a term is other than speculative. What I propose to do is to prove it for the first forty years of the term beginning with 1936, which is the first calendar year after the rejection.

Hincks, J.: You propose to prove it for a period of forty years, beginning in '36?

Mr. Martin: I propose to prove it for each year and for the period, both.

Hincks, J.: For the period beginning in 1936?

Mr. Martin: Yes, sir, beginning January 1, 1936. After that I propose to prove the present value of the rental value of the property. The property has not been re-let to a tenant. It is being operated by its owner, the C. R. & L.; and I propose to prove what the rental value is, each year, and what the discounted value of that rental value is, likewise for a term of forty years, and for each year in the forty years. I then propose to subtract, from the value of the stipulated rental, the value of the rental value, and thus arrive at the amount of the damages, which, from an exhibit which I propose to put in evidence, may be ascertained for any particular year in this forty-year period.

172 There is one item as to which I am not entirely clear what disposition the Court has made of it, and that is the covenant in the lease whereby the New Haven Railroad promised to pay any income taxes levied on the landlord by reason of the receipt of the stipulated rental. It was my original contention that the income taxes on the stipulated rental ought to be calculated and added to the rental, thus ascertaining the value of the rental in tax-free dollars.

My present understanding is that the Court has ruled that that is not the proper procedure, but that the income 173 tax should be calculated on the net avails from the property, and then, when indexed, added to the damages. In short, there is a factor which I am holding out which is this income tax factor, which has been calculated separately, but which in any year can be added to the discounted damages.

After that I propose to give evidence on the present value of money and the future value of money.

Hincks, J.: Do you propose to offer any evidence that after the expiration of this forty-year period the claimant will not, out of the property, recoup losses theretofore sustained?

174 Mr. Martin: Yes. I propose to do that by giving evidence of the present capital value of the property, and showing what the Public Utilities Commission of Connecticut is likely to allow as a maximum return for the purpose of fixing rates, which will, if it were projected far enough, show that, in the entire balance of the term, nothing like the stipulated rental would be arrived at.

I will also adopt very thankfully any suggestions which the Court or the attorneys for the Trustees have to make with regard to giving evidence of the fact that after the forty-year period the damages will continue, or at least that the property will not recoup its losses. But I remark that the lease has been rejected by the New Haven. I can-

not tell, of course, how far into the future they looked when they rejected the lease, but I am confident that they looked far enough to assure themselves that, as far as anyone could be reasonably expected to see, there would be no profits and no chance of recouping losses, because I suppose otherwise they would hardly have rejected the lease.

Hincks, J.: One other point. Do you propose to put on evidence as to the rate of discount?

Mr. Martin: Yes, sir. That is what I meant by the value of money, but the exhibits are calculated on the basis 176
of 4% and no other basis. On the other hand, the fundamental figures are there, so that if the Court felt that 4% was not the proper rate, either I or the Court can use these fundamental figures with another index number if necessary.

Hincks, J.: Very well.

Mr. Martin: I call Mr. Zipf to the stand.

CARL H. ZIPF, called as a witness on behalf of Connecticut Railway and Lighting Company, being first duly sworn 177
by the Court, testified as follows:

Direct examination by Mr. Martin:

Mr. Martin: I ask that this document be marked for identification.

Hincks, J.: Will the Clerk mark it?

(Claimant's Exhibit 1 for identification: Statement of Amounts Payable as Rentals by The New York, New Haven and Hartford Railroad Company on account of the Transportation Properties under the Terms of the Lease Agreement dated December

178

19, 1906 between Connecticut Railway and Lighting Company and The Consolidated Railway Company (now The New York, New Haven and Hartford Railroad Company) and Subsequent Agreements Related Thereto.)

Mr. Garfield: We already have a good many exhibits. I am afraid this will get mixed up.

Hincks, J.: What do you suggest for a series number? Do you know where your old exhibits left off, Mr. Martin?

179

Mr. Martin: I can tell you, sir, or we can mark these "X-1," "X-2."

Hincks, J.: I am afraid we will run out of X's if we start that. (Pause.) I guess your suggestion is good, if we have not any X's so far.

Mr. Martin: There are no X's.

Hincks, J.: All right. Start an X series, beginning with X-1.

By the Reporter:

Q. What is your full name? A. Carl H. Zipf.

Q. Where do you live? A. Bryn Mawr, Pennsylvania.

180

By Mr. Martin:

Q. You are a certified public accountant, Mr. Zipf? A. I am.

Q. You testified at the previous hearing held on June 30, 1937? A. I did.

Q. And you have read the lease and the documents subsequent to the lease which were agreements between the New Haven Railroad and C. R. & L., and are reasonably familiar with the contents? A. I am; yes, sir.

Q. Are you aware that in the lease the rent reserved was $1,500,000? A. The lease states the rent $1,400,000.

181

Q. $1,400,000. What proportion of the rent reserved was subsequently allocated to the transportation property? A. Three quarters of the rental.

Q. And that would amount, would it not, to $1,050,000? A. $1,049,000, the original amount $1,050,000, yes.

Q. And in the paper, Exhibit X-1, which you have in your hand it indicates that the annual rental, stipulated rental, is $1,049,563.50. Why is that? A. That is because of adjustments made in the original rental because of refunding of Derby Street Railway Company bonds in the prior year.

182

Q. And in 1935 and years subsequent thereto, the stipulated rental for the transportation property was $1,049,563.50? A. That is as I understand it, yes.

Mr. Martin: I offer Exhibit X-1 in evidence.

Mr. Garfield: No objection.

(Exhibit X-1 for identification marked Exhibit X-1 in evidence.)

Mr. Martin: I ask that this document be marked for identification.

Hincks, J.: X-2.

(Exhibit X-2 for identification: Statement Regarding Amount of Damages Sustained By Connecticut Railway and Lighting Company For The Forty-Year Period January 1, 1936, To December 31, 1975 On Account Of The Rejection Of The December 19, 1906 Lease By The New York, New Haven and Hartford Railroad Company And Subsequent Agreements Related Thereto.)

183

Mr. Martin: This document is rather interesting, and perhaps if your Honor looked at it it would become clear what I am trying to do.

Hincks, J.: If you have an extra copy I would be glad to see it.

(The Clerk hands paper to the Court.)

184

By Mr. Martin:

Q. The document, X-2, which you have in your hand, Mr. Zipf, has this been compiled under your direction? A. It has.

Q. The first column is a line of figures running from 1 to 40, indicating calendar years, is it not? A. That is right.

Q. The next column shows the years to which the various lines in the exhibit appertain; is that correct? A. That is correct.

185

Q. Now, the column marked "2" indicates the multiplier which, under Kent's annuity tables, would be applicable to find the value of $1.00 on January 1, 1936, payable in any of the particular years listed in Column 1. Is that correct? A. That is correct.

Q. Column 3 is what? A. Column 3 is the value at January 1, 1936, of the stipulated rental, $1,049,563.50, for any particular year shown in that column. The first item, $1,009,195.67, represents the value at January 1, 1936, of an amount of $1,049,563.50 to be paid at the close of 1936, that amount being discounted at 4% interest.

186

Q. And for instance, in the 30th year from 1936, the value of the stipulated rental discounted at 4% would be $323,600.02? A. That is correct.

Q. That is correct. The fourth column is a cumulation of the third column, is it not? A. That is a cumulation of the third column to the end of any year shown in column 1.

Q. So that, again taking 1965, the 30th year, the cumulative value of the stipulated rent payable during those years, discounted at 4%, would be $18,149,086.96? A. That is correct.

Mr. Martin: I ask that this document be marked for identification, please.

187

(Exhibit X-3 for identification: Statement Regarding Amount of Damages Sustained by Connecticut Railway and Lighting Company for the Period December 18, 1935 to December 31, 1935, inclusive, on Account of the Rejection of the December 19, 1906 Lease by The New York, New Haven and Hartford Railroad Company and Subsequent Agreements Related Thereto.)

By Mr. Martin:

188

Q. The document marked for identification X-3, which you have in your hand, is what? A. A statement regarding the amount of damages sustained by the Connecticut Railway and Lighting Company for the period December 18, 1935 to December 31, 1935, inclusive, on account of the rejection of the December 19, 1906 lease by the New York, New Haven and Hartford Railroad Company and the subsequent agreements related thereto.

Q. That is, this is supposed to represent the damages for the period between December 18, 1935, the date of the rejection of the lease, and the end of the calendar year 1935, a period of approximately two weeks? A. That is right.

189

Q. And this document was also made up under your supervision? A. It was.

Q. And the proportion of three quarters of the annual rental represents proration according to the year, according to the time? A. It represents a proration for fourteen days of the amount of rental applicable to the year.

Q. And the second item of 22 odd thousand, where did you get that figure? A. That is taken from a statement which I presume will subsequently be submitted.

Q. A little louder. A. That is taken from a statement which will subsequently be submitted, which shows the

190 earnings from the transportation properties of Connecticut Railway and Lighting Company for the period from December 18, 1935 to December 31, 1935, inclusive.

Q. During that period, however, C. R. & L. was not operating the property, was it? A. No, the property was then operated by the Connecticut Company under the jurisdiction, I think, of the Court.

Q. And the ultimate source of this figure of 22,000 then, is what? A. The ultimate source or the original source is the statement which was originally submitted in evidence, showing avails of the operation of the property
191 during that period, adjusted by subsequent items of revenue which were eliminated from the original statement.

Mr. Martin: Now, with regard to the next two items, let me, please, at this point make an explanation of them. The Supreme Court has stated that the tenant is to have the advantage or the benefit of such expenditures as it has made on the property, suggesting that it will derive this advantage from increased income due to the operation of property of greater value. That automatically occurs with regard to improvements in the property or
192 additional tracks or rolling stock. The New Haven Railroad, however, over a period contributed certain amounts in the form of amortization payments to the Sinking Fund, to secure the bonds of the C. R. & L. And I state that on December 31, 1935, the principal amount of bonds in the Sinking Fund amounted to $3,309,750, which bore interest at the rate of 4½%, and in addition, there was $125,755.96 in cash which was not producing any interest at that moment. I propose, therefore, to give the New Haven the benefit of the income from the Sinking Fund, which was built up by amortiza-

193

tion contributions made before this date to the Sinking Fund by the New Haven Railroad.

The next item, $1,906,000.82.

Hincks, J.: It is 1,000, isn't it?

The Witness: It is $1,906, instead of one million.

Mr. Martin: $1,906.82. The next item represents a proportionate amount of amortization payment properly to be allocated to this two-weeks period. That is, I propose not only to give the New Haven the benefit of the income from the bonds which are in the Sinking Fund because the New Haven under the lease bought those bonds and put them in the Sinking Fund. I also propose to give the New Haven the benefit of the annual amortization payment, which it was required to make.

194

By Mr. Martin:

Q. And then I say, Mr. Zipf, assuming that there were $3,369,750 principal amount of First and Refunding Mortgage 4½% Bonds in the Sinking Fund on December 18, 1935, what interest would those bonds have earned during the period from December 18, 1935 to December 31, 1935? A. They would earn $5,816.26.

195

Mr. Martin: And I ask Mr. Wells and Mr. Garfield if there is any doubt that $3,369,750 was the principal amount of the bonds in the Sinking Fund at that time.

Mr. Garfield: The record shows that figure, Mr. Martin. I do not happen to have it in my mind.

Mr. Martin: See if you can find the exhibit.

Mr. Garfield: I am willing to accept it, your Honor, subject to mathematical correction if we find it is not right. I have no reason to doubt it.

196 *Carl H. Zipf—For Petitioner—Direct.*

Mr. Martin: The figure is contained in Exhibit 1, in the record on appeal.

Mr. Garfield: Those figures that Mr. Martin has given represent three quarters of the contents of the Sinking Fund. I do not know whether you said that in the record.

Mr. Martin: I meant to. That is to say, the figures represent the part of the Sinking Fund to be allocated to the transportation property and the lease of the transportation property which involved only three-quarters of the rental.

197 Mr. Garfield: They represent three-quarters of the figures in the Sinking Fund. I would rather have the documents speak for the allocation.

Hincks, J.: Very well.

Mr. Martin: Well, that is satisfactory to me.

By Mr. Martin:

Q. Now, Mr. Zipf, do you know what three-quarters of the amount of the annual amortization payment into the Sinking Fund, made by the New Haven is? If you haven't got that there, I will find it for you. A. Yes. Three-quar-
198 ters of the amount of the annual contribution to Sinking Fund is $49,713.75. That appears on Exhibit 1 submitted in today's evidence.

Mr. Martin: Oh, does it? Oh, yes. May I say it also appears in Exhibit 7 in the record on appeal, which is the original source of that amount. I now offer in evidence Exhibit X-3.

Mr. Garfield: You have not offered X-2, have you?

Mr. Martin: No, I have not. I have finished about three columns. I am going to get to that. That is identified.

Mr. Garfield: I have no objection to X-3, except that if we find that the figures for the earnings for the thirteen days differ from our own, I assume we can show the difference.

Hincks, J.: I do not think you need specific reservation of the right to submit your own evidence, Mr. Garfield. That will be understood.

(Exhibit X-3 for identification marked Exhibit X-3 in evidence.)

Mr. Martin: I now ask to have marked for identification this document.

(Exhibit X-4 for identification: Statement Showing Net Income from Transportation Properties of Connecticut Railway and Lighting Company for the Period From December 18, 1935 to December 31, 1938.)

By Mr. Martin:

Q. I show you Exhibit X-4, Mr. Zipf, and ask you whether that was compiled under your direction. A. It was.

Q. And what is it supposed to represent? A. It is a statement showing the net income from transportation properties of Connecticut Railway and Lighting Company for the period from December 18, 1935, to December 31, 1938.

Q. Taking up the column headed December 18, 1935, to December 31, 1935, where were those figures secured? A. The amount $22,756.75 shown as income before income deductions, adjustments and Federal income tax, represents an allocation of the cash avails from operation of Connecticut Railway and Lighting Company transportation properties for the period from December 18, 1935, to November 15, 1936, inclusive, which was $333,227.70 as

202 reported to the Court by the Connecticut Company and Connecticut Railway and Lighting Company pursuant to orders of the Court No. 107 in the New York, New Haven & Hartford Railroad Company proceedings, and No. 38 in the Connecticut Company proceedings, entered October 29, 1936, said stipulated $333,227.70 represented the net income for such period of $170,603.90 after deduction of depreciation in the amount of $162,129.83.

Q. Just a minute. You are reading from the Note A on Exhibit 4? A. That is right.

Q. That note you compiled yourself, and it is correct?

203 A. That is correct. That is a correct statement of how the amount shown for the period December 18, 1935 to December 31, '35 inclusive, was determined.

Q. Now, looking at the column headed January 1, 1936, to November 15, 1936, do you know why that period has been taken? A. That represents the period during which the property was under operation by The Connecticut Company.

Q. The period in 1936? A. Yes.

Q. During which it was operated by the Connecticut Company. And for the figures in that Column 2, you submit the same explanation? A. Yes.

204 Q. That is to say, Note A with respect to it? A. That is right, yes. Then, of course, there are adjustments to increase the amount originally reported as the cash avails of operation during the period from December 18, 1935 to November 15, 1936, inclusive, because there were items which were not included in the original amount of income from the property which were subsequently determined as being applicable to the operation of the property.

Q. They are inclu[illegible] here? A. They are included in the amount shown at the bottom of each of the respective columns.

205

Q. And the next column, the third, is headed, "November 16, 1936 to December 31, 1936." And you operated the property during that period? A. The property was operated during that period by the Connecticut Railway and Lighting Company.

Q. And where were the figures contained in that column found? A. They were taken from the books of Connecticut Railway and Lighting Company.

Q. You looked at the books yourself? A. Yes.

Q. And these figures are correct? A. They are correct. They also include adjustments similar to those explained for the period December 18, '35 to November 16—15, 1936.

206

Q. But the figures in the column that we have just referred to, and in the columns dealing with the years 1937 and 38, are figures which you secured from the books of C. R. & L.? A. Those are taken from the books of C. R. & L.

Q. You believe those fundamental figures, as far as you know, are correct? A. Yes.

Q. And what is the third column, that is, the one headed "November 16, 1936 to December 31, 1936," supposed to show? A. That shows the results of operation of the property by Connecticut Railway and Lighting Company for the period indicated. And the sum of that column and the sum of the second column, which appears under the caption, "Calendar Year 1936," represents the income from operation of the property for the calendar year 1936.

207

Q. That is to say that Column 2 plus Column 3 results in Column 4, which is the Calendar Year 1936? A. That is right.

Q. And proceeding to the next column, January 1, 1937 to June 30, 1937, what is that column supposed to represent? A. That represents the net income from operation of transportation properties of Connecticut Railway and

208 Lighting Company for the period from January 1, 1937 to June 30, 1937, inclusive.

Hincks, J.: I did not quite understand with respect to the year '36, as to operating expenses, etc., in that year.

Mr. Martin: May I explain that? November 16, 1936, is the date that the properties were surrendered back to C. R. & L., so that that matter occurred in the middle of the year 1936.

Hincks, J.: Column 4 includes Column 3?

209 The Witness: Yes.

Mr. Martin: Yes, sir.

Hincks, J.: I see.

Mr. Martin: Yes, sir. It includes Column 3. The figures in Column 3 come from C. R. & L. books. The figures in Column 2 come from The Connecticut Company's books. And Column 4, which is the calendar year 1936, is the combination of those.

Hincks, J.: I see. Thank you. But now that I have interrupted you, can I ask you to refresh my mind as to the significance of December 18, 1935? Why does your first column begin on that date?

210 Mr. Martin: That is the date of the rejection of the lease. And that left two weeks in 1935 that we are picking up.

Hincks, J.: I see. The rest of the exhibit is self-explanatory, is it not?

Mr. Martin: I think so.

By Mr. Martin:

Q. Now, why was it, Mr. Zipf, that the year 1937 has been broken into two halves, apparently, since C. R. & L. was operating the properties during the whole of the calen-

dar year 1937? A. It was thought advisable to divide the year 1937 into two periods, because the first part of the year, the property operated consisted of the street railway properties and bus properties, and in the last six months it consisted solely of operation of bus property.

Mr. Martin: In other words, your Honor, we have broken 1937 into two parts.

Hincks, J.: I see.

Mr. Martin: Because the first six months was a combination of bus and trolley. And July 1, 1937 is the start of 100% bus operation, which is the situation at present. 212

By Mr. Martin:

Q. And these figures, also, came from the C. R. & L. books? A. From the records of Connecticut Railway and Lighting Company.

Q. And the column headed, "Calendar Year 1937," is merely a cumulative summation of the two columns immediately to the left of it? A. That is correct.

Q. Is that correct? A. Yes.

Q. And the last column, headed "Calendar Year 1938," 213 what is that? A. That is information relating to the operations of the transportation property of Connecticut Railway and Lighting Company for the calendar year 1938, taken from the books of Connecticut Railway and Lighting Company.

Q. Now, the last line on Exhibit 4 is marked, "Net Income." What does that mean with regard to the first column? A. By the "first column," you mean the period December 18, 1935 to December 31, 1935?

Q. Yes. A. Well, that is the net income for that period; that is, for the period from December 18, 1935 to December 31, 1935, inclusive.

214

Q. That is, the net income of the— A. Of the transportation property.

Q. Of the C. R. & L. transportation properties? A. Yes.

Q. Then the last figure on the second column is for a period other than a calendar year. Likewise, on the third column, the figure is for a period other than the calendar year. A. That is correct.

Q. And on the fourth column, which is headed "Calendar Year 1936," the final figure opposite the words, "Net Income," what is that final figure? A. That is the net

215 income.

Q. Read it to me, to make sure you have the same one I have. A. $246,045.34.

Q. That is right. That is what? A. That is the net income of the transportation properties of C. R. & L. for the calendar year 1936.

Q. Does this figure include the items with regard to amortization payments by the New Haven and the income from the Sinking Fund Bonds? A. No, that does not include those figures.

Q. This is net operating income? A. This is net operating income of the transportation property without adjust-

216 ing it for any of the income which would accrue from the Sinking Fund.

Q. And the last two columns headed respectively, "Calendar Year 1937" and "Calendar Year 1938"—those final figures, that is to say, $179,005.53 and $121,521.83, represent the net operating income of C. R. & L. for those respective years, received from the transportation property? A. There might be a question raised there with reference to your use of the word, "Net operating income," because if you refer to the statement, there is operating income shown above as an item, about the middle of the statement, which is the figure, operating revenues less operating expenses;

whereas the final figure represents the net income from operations, less certain deductions and adjustments for revenues, which are not included in the operating revenue stated on the first line.

By Hincks, J.:

Q. Would this be accurate? Looking at your titles in the extreme left of the exhibit, you have on the third line from the bottom, "Net income after adjustment and before Federal income tax." Now, would it make it accurate if that read, "Net income after all adjustments except Sinking 218
Fund adjustments?" A. Yes.

Mr. Martin: I offer Exhibit 4 in evidence.

Mr. Garfield: I object to the last three columns of this exhibit, your Honor, which cover a period beginning with July 1, 1937. The reason for my objection is that in this peculiar type of case the date of the hearing is vitally important in determining the substantive rights of the parties. The issue is damages for the future, and the period covered by the damages is from the date of rejection of a lease until the date when the lease would, by its terms, 219
have expired. The proof of damages which, according to the Supreme Court, must be made by evidence which satisfies the mind, relates to a period in the future, and depends to a considerable extent upon what the Supreme Court has called "prophecy". Now, the later you hold the hearing, the more of that period has become past and the less is subject to prophecy. If the hearing were postponed until the end of the original term of the lease, there would be no prophecy left and it would all be past. Now, bankruptcy does not do that. Bankruptcy requires that all damages, even damages for the loss of future profits, shall be determined as of some time

220 which is a reasonable time for holding a hearing during the course of the bankruptcy proceedings. Of course, when the reasonable time occurs is a matter which must be determined in each case, and it is subject to the discretion of the Court. In a case of this sort, if the hearing is held too soon, the landlord is obviously put at a disadvantage. He does not have time to decide what to do with his property or to try to find another lessee for it, or to equip himself to operate it. On the other hand, if the hearing is held too late, the lessee, the former lessee, is put to a 221 disadvantage because the landlord has a longer period of past damages which may be substituted for the estimate of the future rental value.

Now, normally, the Court will fix the period at a time which is consistent with the proper and reasonably rapid carrying-on of the reorganization or the bankruptcy proceeding. In this particular case, a hearing was held starting on the 30th of June 1937 and ending on the second of July, 1937. That hearing was over a year and a half after the rejection of the lease, and was seven and one-half months after the landlord had repossessed its property and 222 had begun to operate it itself. There can be no claim that the hearing was held unduly early. In any event, the hearing was fixed by the Court with the consent of the parties, and it was fixed without giving thought to advantages or disadvantages to either party, of the sort that I am talking about. In other words, it was fixed, as it properly should have been, without trying to give an advantage to either side by reason of the date of the hearing. There was at that time no thought that the date of the hearing would make any difference to either side in this particular.

Consequently, we have the date fixed as a reasonable date for the hearing, and we maintain that the evidence to be received at this hearing should be such as would have been available at that time, and that the landlord should not be allowed the benefit of an additional period of nearly two years, which delay is in no way chargeable to the lessee.

Hincks, J.: Objection overruled.

Mr. Garfield: May I have an exception?

Hincks, J.: Exhibit 4, then, is marked in evidence. 224

(Exhibit X-4 for identification marked Exhibit X-4 in evidence.)

(Exhibit X-5 for identification: Statement regarding Annual Earning Power of Three-fourths of the Contents of the Sinking Fund referred to in the Lease of December 19, 1906 as at October 23, 1935; Sinking Fund for First and Refunding Mortgage 4½% Fifty Year Gold Bonds of Connecticut Railway and Lighting Company.)

By Mr. Martin: 225

Q. I show you a document marked for identification, X-5, and ask you what that is. Oh, in the first place, I ask you if that was compiled under your direction. A. It was.

Q. What is it? A. The statement regarding the annual earning power of three-fourths of the contents of the Sinking Fund referred to in the lease of December 19, 1906, as at October 23, 1935, Sinking Fund for First and Refunding 4½% Fifty-Year Gold Bonds of the Connecticut Railway and Lighting Company. This shows the earning power of the contents of the Sinking Fund, which amount is used as a subsequent credit in determining the increase of the earning power of the property.

226

Q. Well, on December 31, 1935, there was $125,755.96 in cash in the Sinking Fund, that was not earning any income. A. Yes.

Q. Do you know what was done with that cash? A. Well, as of January 1, 1930, let's see. January 1, 1936, that cash was used to buy bonds for the Sinking Fund.

Q. As shown in this statement? A. Yes.

Q. And those additional bonds which were bought with the cash on hand on January 1, 1936, are counted in in calculating the annual bond interest to be allocated to the lease of the transportation properties? A. Yes.

227

Q. And that amount of bond interest, as shown by Exhibit 5, is $157,028.31 annually? A. That is right.

Mr. Martin: I offer Exhibit X-5 in evidence.

Mr. Garfield: No objection.

(Exhibit X-5 for identification marked Exhibit X-5 in evidence.)

Mr. Martin: I ask that this document be marked for identification.

(Exhibit X-6 for identification: Statement Showing Net Operating Income Before Federal Taxes of Connecticut Railway and Lighting Company Transportation Properties for the Years 1924-1938, Inclusive, and Such Income for the Average or Normal Year During Such Period.)

228

By Mr. Martin:

Q. I show you this document marked for identification X-6, and ask you whether this was compiled under your direction? A. It was.

Q. I ask you what it is. A. It is a statement showing the net operating income before Federal taxes, of Connecticut Railway and Lighting Company Transportation Prop-

erties for the years 1924-1938, inclusive, and such income for the average or normal year during such period.

Q. The figures for the years 1938, 1937, and 1936—where did they come from? A. They are taken from the statement which was submitted.

Q. I guess that is X-4. See that there? A. Yes. Oh, yes. I am looking backwards here. They are taken from the statement submitted as X-4, as Exhibit X-4, the amount of $145,535.13 appearing as the third to the last item on the column indicated as Calendar Year 1938. And the amount for the year 1937 appearing as the second to last item 230 in the column indicated as Calendar Year 1937.

Q. That is right. A. And the item for the year 1936, $251,069.45, appears as third to the last item in the column of Exhibit X-4 for the Calendar Year 1936.

Q. The columns headed 1924 to 1935, inclusive, where did those figures come from? A. They were taken from reports of The Connecticut Company to the Public Utilities Commission of the State of Connecticut for the respective years.

Q. And how have you calculated the proportion of the Connecticut Company's reported gross revenues and gross expenses, so as to find what proportion of those should be allocated to the C. R. & L. properties? A. That was deter- 231 mined in accordance with a note appearing on the bottom of the statement which is a rather lengthy note. I will read it, if you desire.

Q. You followed the note? A. Yes.

Q. There is a figure here which you have under a column headed, "Average or Normal Year." The figure is $235,-925.51. How did you get that figure? A. That is the average of each, of the sum; rather, that is the amount which represents 1/15. I think that—yes, represents 1/15 of the sum of all of the items appearing as Item 6 on this statement. In other words, it is the average for the fifteen-year period.

232 Q. It is the average for the fifteen-year period. And is that the figure which was used in Exhibit 2 in making the calculations for the year 1939 and subsequent years? A. Yes.

Q. That is to say, you took—. A. That is the basis. That was adjusted by other items.

Q. Well, yes. The other items were the bond interest—A. Earning power of the Sinking Fund.

Q. —with which the New Haven was credited and the annual amortization installment? A. That is right.

Q. What? A. That is correct.

233 Q. Those were the two items? A. Yes.

Q. In other words, you drew off here what you call a normal year, in which you say that the average operating income before income taxes for this fifteen-year period of the C. R. & L. transportation properties amounted to $235,925.51. A. That is right.

Q. And to that figure you added the annual bond interest of approximately $157,000, representing the interest earned by the Sinking Fund bonds which had been bought out of money paid over by the New Haven Railroad? A. Yes.

Q. And you also added the three-fourths of the annual amortization payment made by the New Haven, amounting

234 to 49,000-odd dollars. Is that correct? A. That is correct, yes.

Q. So that the 235-odd thousand operating income was swelled by those two items? A. That is correct.

Q. And, having got the result of your calculation of the net operating income plus these two items, you listed that result in Exhibit X-2? A. That is correct.

Q. Wait just a minute. A. And that appears in the explanation of the notes accompanying X-2, that is, how the amount used is determined.

Q. Oh, you drafted those notes on X-2, also. A. Yes.

235

Q. Yes. Mr. Zipf, the first three lines of X-2, which apparently are for the years 1936, 37 and 38, are based on actual figures. I have in mind columns 5 and 6.

Hincks, J.: What exhibit are you on?

Mr. Martin: X-2. Excuse me. I will have to consult with this witness. I am mixed up myself.

(Discussion off the record, between Mr. Martin and the witness.)

By Mr. Martin:

236

Q. On X-2, in columns numbered 5 and 6, the first three items in those columns are based on actual figures secured from the actual operation of the transportation properties? A. That is correct. Adjusted, of course.

Q. I understand. A. By the earning power of the Sinking Fund and the annual Sinking Fund contribution.

Q. And the figures in columns 5 and 6 subsequent to the first three items are based on your so-called normal year of 235,000, increased by these two items of bond interest and amortization payments. A. That is correct.

237

Mr. Martin: Now, going back to Exhibit X-2 again. Did I offer X-6 in evidence?

Hincks, J.: No.

Mr. Martin: I offer Exhibit No. X-6 in evidence.

Mr. Garfield: If your Honor please, I object to this exhibit. If you will note the footnote——

Hincks, J.: I have noted it.

Mr. Garfield: —which relies upon my testimony, I used several verbs in the present tense in that statement, and the statement which I made was a correct statement, but it was a correct statement using the present tense. It was not a correct statement for the years 1934 and other years earlier than

238

the time at which I was speaking. And a very misleading result is obtained by applying figures based on conditions in 1935 at the time that my statement was made, to earlier years. We have the exact figures and are prepared to present them if they seem important in this proceeding.

I object to an exhibit going in which shows absolutely wrong figures, when the witness knows nothing about figures except that he has taken total figures which are correct, total System figures, and applied a relationship which was accurate in 1935 but did not

239

apply to the earlier years, and has thus produced results which will not be of any value whatsoever to the Court because they are entirely wrong.

Mr. Martin: Of course, your Honor, I have no objection to Mr. Garfield putting in the actual figures if he has them. He has them and I haven't got them. I do invite your Honor's attention, however, to exactly what Mr. Garfield did say.

Hincks, J.: Doesn't that appear in the note?

Mr. Martin: No, not fully.

Hincks, J.: It is in quotes.

240

Mr. Martin: On December 7, 1935, at which a hearing was held on the question of whether this lease should be rejected, the Court said, "Some of those busses it," meaning the Connecticut Company, "holds as sub-lessee and some it holds outright?

"Mr. Garfield: Yes, the same with trolleys. Some they hold as sub-lessee and some outright. Roughly two-thirds is owned and one-third leased. The more accurate figures are on the revenue basis. About thirty per cent of the income comes from the leased property and seventy per cent from the owned property. On the expense side about one-third of the expense appertains to the leased property and two-

thirds to the owned property. The owned property has a little better ratio of revenue and expense than the leased property. There is a little more revenue left over.

"The Court;"——

Hincks, J.: Thus far, you have quoted verbatim the note on the exhibit.

Mr. Martin: "The Court: A little smaller deficit?

"Mr. Garfield: A little smaller deficit. The experience of the company has made it too plain to need discussion, I believe, that the leased property 242 cannot be operated under the terms of the lease and the documents subsidiary to it without incurring a very substantial loss, * * *."

Hincks, J.: Very well.

Mr. Martin: Now, that statement certainly was not made by counsel for The Connecticut Company or counsel for The New Haven Railroad for any purpose except to convince the Court that experience had shown that this lease was an onerous lease and ought to be rejected, and he satisfied the Court that that was the case. He also satisfied me, your Honor.

Hincks, J.: The question now is, it is not the 243 qualitative one that was then before the Court, but the quantitative one. And it appears to me that the note, as Mr. Garfield points out, is wholly in the present tense. And when you translate it backward for twelve years, the result might be well different.

Mr. Martin: And it might well be the same.

Hincks, J.: It might be.

Mr. Martin: But at least, it is the only evidence in the case so far as to what the proportion was, and it is not unreasonable, once that proportion has been shown, once the statement has been made that experience makes it perfectly plain, too plain to need dis-

244 cussion, on the basis of the further statement that one-third of the expense and 30% of the gross income is the operating ratio. There is no reason to suppose that that operating ratio has not been constant.

Hincks, J.: There is no reason to suppose it has.

Mr. Martin: That is right, no more reason to suppose it has except that this is the only evidence in the case of that.

Hincks, J.: I suppose it is one of my duties to see that no wrong evidence should come into the 245 evidence. And this has not been shown to be right. The burden is on the claimant. I feel that I must sustain the pending objection.

Mr. Martin: Then, may I ask Mr. Garfield if he will submit the figures, and I hope very much that he has them in some kind of an exhibit.

Mr. Garfield: We have figures for the years——

Hincks, J.: I was going to suggest a short recess at this point. Perhaps if I take it now, you can confer a moment.

Mr. Martin: All right, sir.

246 (At 12:18 P. M. a recess was taken until 12:32 P. M.)

CARL H. ZIPF, a witness called on behalf of Connecticut Railway and Lighting Company, resumed the stand and testified further as follows:

Mr. Martin: Mr. Garfield, at the moment, has some ratios. I do not think that they mean very much without the figures in them. It will take an hour, probably, to work the figures out, but I think we could work it out, say, by 2 o'clock.

Hincks, J.: Your suggestion is we suspend till 2 o'clock?

Mr. Martin: Isn't that your suggestion?

Mr. Garfield: I didn't suggest it.

Mr. Martin: Well, I suggest that if Mr. Garfield will give me the figures that fill out the sheet I have already seen, that by 2 o'clock I will have been able to work out some kind of a ratio that will justify drawing a normal year for all the years except 1924. He has no figures for 1924, but that will give me from '25 to '38.

Hincks, J.: If it were not for this snag, how long would your case have taken, Mr. Martin? 248

Mr. Martin: Well, that is what I am trying to make a deal now about. I want to offer evidence and prove that the capital value of my property is three million four hundred——

Hincks, J.: I am trying to get some estimate for other engagements.

Mr. Martin: If I have to prove this, it will take five hours, I think. I have eleven witnesses. If I can show my exhibits to Mr. Wells and Mr. Garfield and they will look at them during lunch time and agree that that is what these people would testify to, it wouldn't take any time at all. Outside of that, I 249 have less than an hour left.

Hincks, J.: Will the debtor have much evidence?

Mr. Garfield: It depends a good deal on what happens to some of these things of Mr. Martin's. As to this line of testimony that he is talking about now of valuation of the property, there are two questions. Mr. Martin is talking simply about the method of proof. If he is going to have to put on eleven experts to prove values, of course, it means a great deal more time. We have no idea about value, and as to that question of proof, we have not even gotten to that because, in our opinion, the evidence

250 as a whole is not admissible, and unimportant. Perhaps we could deal with that question, even before we come to the method of proof, if the evidence is to be received. If Mr. Martin wants to make an offer of proof which will raise this issue, perhaps we can deal with the admissibility of that type of evidence, and then if it is admitted we will have to face the problem of character of proof.

Hincks, J.: I had another hearing this afternoon, and I wondered if we could not run along until lunch time and then if you want to take a recess for a
251 couple of days, why, do that. How would that suit you, Mr. Martin?

Mr. Martin: That would suit me all right. That will be satisfactory. That will also give me a chance to—well, I don't know how far—no, I can't take Mr. Garfield's figures without cross-examining his witnesses. He has not charged off any depreciation on my property.

The Court: You could cross-examine them at the continued hearing.

Mr. Martin: Yes, that would be all right.

Hincks, J.: Is that procedure agreeable to Mr.
252 Garfield?

Mr. Garfield: Yes, sir.

(Discussion off the record regarding date of continued hearing.)

Mr. Garfield: If we could, perhaps, deal with the admissibility of this line of evidence this morning, it might result in a great shortening of the hearing on Wednesday or Thursday.

Hincks, J.: Well, then, let us continue now with the idea that we will take a continuance when we have gone as far as we can today.

Mr. Martin: Well, I can adopt Mr. Garfield's suggestion and make an offer of evidence. I am prepared to call witnesses. Is that a useful thing to do?

253

Hincks, J.: I would rather not make any suggestion, Mr. Martin. I would rather let counsel proceed in their own way, and make rulings as best I can. If you want to make an offer, certainly I will hear you, but I do not want you to say that I suggested it. That is all.

Mr. Martin: There is no use of bringing eleven witnesses here and bringing them back again, if they are not going to get in.

Hincks, J.: Just suit yourself.

254

Mr. Martin: I offer to give evidence which will establish that the present value——

Hincks, J. (interrupting): I think, if I may be permitted to make this suggestion, "Evidence tending to prove," is perhaps more appropriate.

Mr. Martin (continuing): —evidence tending to prove that the present value of the property of Connecticut Railway and Lighting Company used in the transportation part of its business is $3,407,027.

255

The reason I make this offer is that I believe that that being the capital value of the transportation property, that it is likely, as I also propose to show, that the Public Utilities Commission of Connecticut will prevent more than what it considers a fair return to be earned on that property, if necessary by reducing bus rates, and that the Public Utilities Commission has evinced a disposition to fix 6½% as a fair return on public utility property, and that it is likely to fix 6½% as a fair return on our property, and that 6½% of $3,407,027—(pause)—is a certain amount. I have not done it. Can you give me that answer? What is 6½% of 3,407,000?

The Witness: 3,407,000?

Mr. Martin: Let me get this figure. (Pause.)

(Witness writes.)

256

The Witness: 221,455. I am just using round figures.

Mr. Martin (continuing): —is approximately $222,000.

Hincks, J.: Is there any objection to such an offer?

Mr. Garfield: Yes, your Honor.

Hincks, J.: And the grounds?

Mr. Garfield: What the Public Utilities Commission will do in the future is obviously a matter of speculation. I might even say, "guess." I am not

257

ready to agree that the Public Utilities Commission is going to fix the rate of return allowed to a bus company on any basis comparable to that which has, in the past, been allowed to trolley companies, for the very obvious reason that trolley companies have a very large capital investment, bus companies having very small capital investment. If the Public Utilities Commission should think that the rate of return which the bus company was earning was too high, Mr. Martin suggests they might reduce fares in order to reduce the rate of return. The result might be

258

that the riding would increase so much under the reduced fares that the rate of return would go up. I suppose that Mr. Martin then suggests that they would then fix minimum fares, and then raise the fares so that they won't make so much money.

Mr. Martin: No, I would then suggest that operating costs would go up.

Mr. Garfield: Of course, in answer to that, it is obvious that operating costs do not go up in the same ratio as gross revenue. My objection is basically that this line of evidence is so speculative that it will not satisfy the Court's mind—it cannot possibly satisfy the Court's mind—that as a result of public

259

regulation this company is not going to be allowed to earn more than a certain percent of its investment. Furthermore, while the figure given may be correct as the value of investment at the present time, if the business becomes profitable the investment undoubtedly will increase. There may be twice as many busses running. There may be ten times as many busses running. The investment may increase very substantially, and the earning power in proportion. I maintain that this evidence is not of the sort which the Supreme Court says must be presented in this type of case.

260

Mr. Martin: Of course, it does not make any difference whether the——

Hincks, J. (interrupting): I think the Supreme Court opinion indicates that the claimant ought to be allowed to submit all the evidence he has got, and that, when the evidence is in, then is the time for the Court to weigh it as best it can.

I feel that for the Court to whittle down the claimant's case by considering it item by item, is not at all indicated in the Court opinion nor generally required under the law. I will overrule the objection.

261

Mr. Garfield: May I have an exception?

Hincks, J.: And admit the evidence for what it is worth, without any implications as to what I will do with it when it is in.

Mr. Martin: Does your Honor's ruling leave us with evidence in that the present value of the property is $3,407,027? Or does it leave us with me permitted to put on witnesses to prove that, if I want to?

Hincks, J.: The latter.

Mr. Martin: The latter. Then we have not got it yet.

262

I might go to an entirely different division of my case and spend the next twenty minutes proving the value of money, which is short.

(Witness excused.)

Mr. Martin: Exhibit X-2 never got in evidence, did it?

Clerk Pickett: X-2 seems to be here.

Mr. Martin: It did not get in evidence, did it?

Hincks, J.: No.

Mr. Martin: It is just identified. I think that all the exhibits are, except X-2.

263

A. G. Cederstrom, called as a witness on behalf of Connecticut Railway and Lighting Company, being first duly sworn by Clerk Pickett, testified as follows:

By Clerk Pickett:

Q. Your full name? A. A. G. Cederstrom. Address, Narberth, Pennsylvania.

Direct examination by Mr. Martin:

264

Q. Mr. Cederstrom, what is your business? A. I am a financial analyst. I am Vice-President of the United Savings and Beneficial Association, with offices at Philadelphia, Pennsylvania. I provide financial advice to a number of charities, including the Bryn Mawr Hospital, the Episcopal Academy, and the Y. M. C. A. of Philadelphia.

Mr. Martin: I ask that this paper be given an identification number.

(Exhibit X-7 for identification: Two sheets: Chart of United States' Treasury Bond Yields

Based On Standard Statistics Company, Inc., Index of Interest Rate On Treasury Bonds; Interest Rate On Treasury Bonds (U. S.) Unit: Percent. An Average of Daily Rates.)

Clerk Pickett: What do you call it?

Mr. Martin: It is "Chart of U. S. Treasury Bond Yields."

By Mr. Martin;

Q. I show you Exhibit X-7 and ask you if you made this exhibit. A. I did. 266

Q. And you also made the paper that is annexed to it? A. Yes, sir.

Q. And what does this chart purport to show?

Mr. Martin: That is for the Judge, if he wants it.

A. It purports to show the trend of bond yields on Treasury obligations.

Q. What kind of bonds? A. On United States Treasury obligations.

Q. And this calculation is made for the years 1919 to 1938 inclusive? A. Yes, sir, with first—— 267

Q. Yes? A. With a dotted line added for 1939.

Q. And the line entitled "Average 1919 to 1939," did you calculate that average? A. I did.

Q. That is correct, is it? A. That is correct.

Q. And does the chart indicate that the yield in percent on United States Treasury bonds is just over 3½% during that period? A. It does.

Mr. Martin: I offer the document in evidence.

Mr. Garfield: May I ask a question or two?

Hincks, J.: Before you do, may I ask Mr. Mar-

268 tin a question? I thought you were going to claim a 4% rate.

Mr. Martin: I am, sir.

Hincks, J.: And this evidence shows something less than that?

Mr. Martin: Yes, sir.

Hincks, J.: I wonder, is there any dispute between counsel on this issue? If the claimant is satisfied with the 4% rate, has the Debtor anything other to suggest?

269 Mr. Garfield: If your Honor please, we feel that 4% is too low a percent.

Hincks, J.: Well, I just wanted to find out if there was a dispute. If there is an issue, why, you can go ahead. What were your questions?

By Mr. Garfield:

Q. Mr. Cederstrom, why did you start with 1919? A. That information was based on the material compiled and published by Standard Statistics Company and the index goes back a little farther than 1919.

270 Q. And that is your only reason? A. That is my only reason.

Q. Now, Standard Statistics prepare charts on a good many different types of securities, in addition to Government bonds, do they not? A. They do.

Q. And you are familiar with their charts? A. I am.

Q. Is it not true that if you had used a chart based on industrial bonds, it would have shown a considerably higher rate than this? A. I think that will be introduced later, but it will show slightly higher.

Q. And the same would be true if you had used railroad bonds or utility bonds, or any other type other than Government bonds, would it not? A. That is true.

Mr. Garfield: No objection.

(Exhibit X-7 for identification marked Exhibit X-7 in evidence.)

Mr. Martin: I ask that this be marked for identification X-8.

(Exhibit X-8 for identification: Three sheets: Chart of Municipal Bond Yields Based On Standard Statistics Company, Inc., Index of Municipal Bond Yields; Standard Statistics Company, Inc., Index of Municipal Bond Yields; Bonds Used in Municipal Bond Index.) 272

By Mr. Martin:

Q. I show you a copy of Exhibit X-8 marked for identification, entitled "Chart of Municipal Bond Yields," based on Standard Statistics Company going back to 1900, and ask you if you made this chart. A. I did.

Q. And every line is supposed to indicate the yield on certain muncipal bonds in each year? A. It is an average of the prices, of the yields which prevailed during that year.

Q. And the page annexed, the last of the two pages annexed, shows the bonds which were taken? A. That would be the second page. 273

Q. Did you say "yes"? A. That is right. The second annexed page shows the bonds used in compiling this index. The ones indicated by a star are the ones being used at present.

Q. And the first of the annexed pages shows the data used in making out the chart, is that right? A. Yes, sir.

Q. And where did you get this information from? A. This information was obtained from publications of Standard Statistics Company.

274

Mr. Martin: I offer it in evidence as Exhibit X-8.

Mr. Garfield: Is this as far back as Standard Statistics goes on this series?

The Witness: Yes, sir.

Mr. Garfield: And that is the reason you limited it to these years?

The Witness: That is the reason I limited it.

Mr. Garfield: No objection.

(Exhibit X-8 for identification marked Exhibit

275 X-8 in evidence.)

Mr. Martin: I ask this paper be marked for identification, Exhibit X-9.

(Exhibit X-9 for identification: Graph: Source. Standard Trade and Securities. Friday, March 4, 1938. Charts. A Graphic History of Business and Security Trends. Page Ch—21.)

By Mr. Martin:

Q. And, Mr. Cederstrom, I show you a copy of Exhibit X-9 and ask you what that shows. A. That shows interest

276 rates on Treasury bonds. It shows the reserve rediscount rate of the New York Federal Reserve Bank, and an average of the reserve rediscount rate of twelve Federal Reserve Banks.

Q. Did you make this? A. I did not.

Q. Where did it come from? A. It was photographed from a publication of Standard Statistics Company.

Q. And is Standard Statistics a recognized authority on these data? A. It is.

Mr. Martin: I offer Exhibit X-9 in evidence.

Mr. Garfield: No objection.

(Exhibit X-9 for identification marked Exhibit X-9 in evidence.)

Mr. Martin: I ask that this paper be identified as Exhibit X-10.

(Exhibit X-10 for identification: One sheet: Chart I—Absolute Growth of Life Insurance Assets—1906-1937; Chart II—Relative Growth of Life Insurance Assets—1906-1937.)

By Mr. Martin:

278

Q. Mr. Cederstrom, I show you a copy of Exhibit X-10. A. Yes, sir.

Q. And ask you what that is supposed to show. A. First, it shows the growth of Life Insurance Company assets from 1906 to 1937.

Q. It also shows the proportionate division into which the investments fall, doesn't it? A. It does.

Q. And where did this come from? A. This was obtained by myself from a firm of insurance counselors in Philadelphia, Towers, Perrin, Foster & Crosby, Inc.

Q. Did you secure the data for making up this chart from them? A. I did not.

279

Q. Where did it come from? A. They prepared the chart.

Q. And where did they get the fundamental data? A. They obtained the fundamental data from recognized insurance company publications and their annual reports of the insurance companies.

Mr. Martin: I offer Exhibit X-10 in evidence, if there is no objection.

Mr. Garfield: No objection.

(Exhibit X-10 for identification marked Exhibit X-10 in evidence.)

280 Mr. Martin: I want to explain, if I may, why I think this is important. The division called "U. S. Government Securities," which is read from the bottom has not only very much enlarged, but is, I think, the only division of securities which indicates that it is on the increase still. In 1930 that proportion of investments for life insurance assets was small, but it is very much larger than it was before; and the conclusion that I draw from this is that even experienced investors are now investing their assets very largely, and have been for some years, 281 in United States Government securities. And the reason that I suppose that that is important is that the Supreme Court has said in a case which is in the short memorandum which I handed up a little while ago, that the investment of the funds paid on account of so-called future damages, must be made without the exercise of skill or experience or ability. In other words, you give the money to the plaintiff and he is expected, in the exercise of no particular discretion, to buy the safest investment that he can and continue that investment without the advantage of investment advice.

282 *Cross-examination by Mr. Garfield:*

Q. Mr. Cederstrom, as to each of these charts you have shown a comparatively limited period, have you not? A. It is the period which has been available to me.

Q. Now, in your study of Government Bonds, Municipal Bonds and other securities, you know, do you not, that if you had gone back further you would have found the pendulum swinging first one way and then another? A. Yes, but always gradually upward.

Q. Always gradually upward. If that means anything

to you, I confess it does not to me. A. Bond prices upward, yields down.

Q. Always? A. Gradually.

Q. Starting when? A. Well, as far back as I have been to study. I think the only indexes available go back as far as 1856.

Q. And comparing 1938 with 1856, bond prices are higher and yields are lower, are they? A. Yields are lower.

Q. That tendency has been true unbrokenly since then? A. No, it has fluctuated up and down. 284

Q. There will have been swings up and down? A. That is right.

Q. And you know no reason to suppose that there will not continue to be swings up and down in the future, do you? A. I cannot forecast that.

Mr. Garfield: That is all.

Cross-examination by Mr. Wells:

Q. Just a question or two. Are you prepared to make any guess or give any opinion concerning the future interest rate? A. I am prepared to give a guess, but it will 285 be a guess only, in my opinion, if you want that.

Q. What is that? A. My guess is that interest rates will continue for some time yet at a rather low level, and that may stretch into a good many years, because the demand for capital has lessened considerably in the last few years because the country has developed its industries, railways and utilities to a point where additional capital is not so essential.

Q. But you wouldn't predicate any specific rate for any specific number of years? A. No, sir.

Q. What affects the interest rate? A. Well, practically everything. If we had a major war today, interest rates

286 would probably get considerably higher. Fear has a great deal to do with it.

Q. You wouldn't attempt to predict the interest rate for A. D. 2900? A. No, sir.

Q. Would you undertake to predict it for forty years from now? A. No, sir.

Q. Twenty years from now? A. (Pause.) Well, may I answer that another way?

Q. I would like to have you answer that question. A. I would be, if I had money to invest today——

287 Q. Well, now, you are not answering the question. I asked you whether you could predict the matter for 20 years. A. No, sir.

Q. Are you acquainted with the charts prepared by Standard Statistics for 15 industrial securities, 15 railroad bonds, and 15 utilities? A. Yes, sir.

Q. What do those charts show? A. Well, those charts show considerably higher yield than on the bonds that are listed on these charts or charted here on these charts.

Q. Do you have a copy of those charts here with you? A. I have a copy of Standard Statistics publication.

Q. Giving those figures? A. Yes, sir.

288 Q. Will you state what they are? A. That was 15 industrials at—of course, I can't quote you an average.

Q. How many years do you have them for? A. They go back to 1900.

Q. All right. State what the chart shows. A. The fifteen industrial bonds show they were 4½%—let's say between 4 and 6 for the period from 1900 to 1920, roughly. From then on——

Q. What was the highest figure for that period, 6%? A. It reached slightly over 6% in 1920.

Q. How much over? A. Just a fraction. I can't figure. It must be just about 6.10.

Q. What was the lowest yield during that period? A. The lowest yield during that period was about 4.3.

289

Q. What about the period since 1920? A. From 1920 on, it gradually settled itself around a 5% level. In 1930, or from—I gave up to 1929. 1930——

Q. What was the highest interest yield between 1920—— A. For 15 industrial bonds, it climbed to, I should say, about 9%. From 1930, it dropped in a jagged line down to about 4.3 in '35. And it ended '38 at roughly 5% level.

Q. Going up again a little then? A. Do you want the trend since the end of '38?

Q. What is it? A. I say, do you want the trend since the end of '38?

290

Q. Yes, if you have that. A. I probably could find it. (Pause.) Fifteen industrial bonds: November, '38, averaged 4.96; December, 5.14; the month of January, 5.08; the first week in February, 4.99.

Q. Now, do you have similar figures for utilities? A. Yes, sir. Fifteen public utilities. The trends have followed more or less in the same pattern.

Q. What is the highest interest yield between 1920 and 1919, 1910 and 1919? Or 1900 was the figure you used before. A. 1900 was the beginning of the chart. This is 1900 and 1919 you want?

Q. Yes, whatever it has there during that period. A. 291 About 5½% is the highest between 1900 and 1919.

Q. Yes, and the lowest? A. About 4½%.

Q. What year did the highest yield occur? A. The highest yield occurred in 1919.

Q. Now, after that time, after 1919, what is it? A. It gradually crawled up over 6% in '20 and '21; then eased off and stabilized around a 5% level between 1922 and 1930. And from 30: In 1931 it was 5.8 roughly, and then it began a downward swing until in 1935 it reached 4%. Then it gradually crawled back to about 5% at the end of 1938.

Q. You are speaking of average now? A. These are averages for fifteen bonds of varying quality. They are not money rate bonds.

This same average of fifteen public utility bonds, the yield in November '38 was 4.52, December 4.68, average for January was 4.54. The first week in February was 4.54.

Q. Now, do you have similar figures on bonds of bus companies? A. No, sir. There is only one company that I know of in the bus business, and I doubt whether they would qualify as a bond. They would be equipment notes of the Greyhound Corporation and so far as I know, there are no statistical averages.

293 Q. What is the yield on those? A. I think they are relatively low yield, because it was relatively short-term and secured by equipment.

Q. Do you know what the yield is? A. I do not.

Q. Do you have any figures on trolley obligations or combination trolley and bus? A. There are no indexes covering such bonds.

Q. What do your figures show on railroad bonds? A. That is steam railroads?

Q. Yes. A. Fifteen utilities, fifteen railroad bonds. 1900 to 1904, they ran around 4% basis.

Q. What is the highest yield in that period? A. It is just the slightest amount over 4%, and they also dropped 294 below 4%, so the average for the period must have been——

Q. That is 1900 to 1904? A. For 1900 to 1904 inclusive, yes. Then the next block is from 1905 to 1909, and it rose as high as probably 4½%, but most of the time at around the 4% level.

Q. That is the average? A. That is the average for fifteen railroad bonds. Between 1910 and 1914, slightly over 4%. 1914 was probably 4¼%. They are gradually creeping upwards. In the period 1915 to 1919, began around 4½%, climbed up to around 5½%.

Q. What is the highest yield in that period? A. About 5½% is as close as I can read it. Then from 1919—well,

say in 1920, it continued the upward trend and reached slightly over 6%. That held through 1921. Then it began a decline. 1922, about 5¼%.

Q. Is that the average? A. That is an average. It then continued a very slow decline until it reached about 5% in '29. That, also, continued over into '30 and '31. '32 showed somewhat of an increase, and at the end of the year they had gone slightly over 6%. I beg your pardon. They had gone up to about 7%.

In the following year, that was '33, they reached about 9%, that is a high of 9%, and then took a very rapid drop 296
down to about 6½%. Then in '34 it again climbed up over 8%, and since then there has been a gradual decline. '35, slightly below 5%. '36 about .4 and ¾%. '37, about, I guess, the average would be about 4.80 or 4.90. Anyhow, at the end of '38 they had reached roughly a 5% basis.

I will try and check those figures here. I beg your pardon. That last '38, I was looking at the wrong line. It went up towards—closed up around 8% basis. It was a violent upswing in industry, as you can tell from this at the end of November, or for the month of November the average was 7.69, December was 7.76, and January of '39, 7.61; the first week of February, 7.68. 297

Q. Is it generally true that these yields are very much affected by business conditions in that yields are likely to be small in a period of depression and higher in a period of expansion? A. That depends entirely on the quality of the bonds.

Q. And are you able to generalize at all about the effect of expanding business upon yields? A. Yes.

Q. What could you say? A. Ordinarily, interest rates rise as stock prices rise. In other words, that means a lower price for bonds and higher prices for stocks.

Q. And of course, the stock prices would rise as business expands? A. As business expands, yes.

298 Q. Well, isn't it true that when companies need money for expansion of their facilities that the interest rates are likely to rise? A. When companies need money for increasing their facilities or expansion?

Q. Yes. When they are in the market for money with which to finance capital improvements, isn't that likely to have an effect on the yield, increase it? A. Yes. As the demand becomes greater, the interest price paid must be higher.

Mr. Wells: That is all.

299 *Redirect examination by Mr. Martin:*

Q. Mr. Cederstrom, Mr. Fenlon, who has been following this from the table over there, says you have been reading from the wrong line ever since 1924. Do you want to look at that again and see if you haven't made a mistake? A. What on, Rails?

Q. On Railroads. A. It is awfully hard to follow. I might have. Railroad bonds——

Q. Ever go above 9%? A. No, I guess I confused that with the industrial.

300 Q. Well, I will ask you another question.

Mr. Wells: Could he then read the correct figures in now?

Mr. Martin: I do not know whether he can or not. He does not seem to be able to.

The Witness: A very difficult chart to read. Would you want me to begin all over with Railroad Bonds?

Mr. Wells: I haven't the charts before me. Apparently, these gentlemen have. I just wanted you to correct your statement if you made an erroneous

one. They said you started reading wrong about 1924.

The Witness: 1924, was it? All right, I will correct from 1924 on.

By Mr. Martin:

Q. Rail bonds. A. In 1920 the rail bonds were yielding 6%. There was a gradual decline to about 5% in 1922. It was about 5% in 1923, about 5% in 1924. Around or slightly below 5% in 1925. About—then a gradual decline occurred and it dropped down to about 4¼% in '26. Then there was a slight rise in '27 and '28. They got up to slightly below the 5% level. From 1930—1930 it was roughly 4½%. 1931, roughly—1931 the average began at about 4½% and gradually crept to about 5.8 or 5.9. Then in '32, the highest yield reached was slightly below 7%. In '33 it was roughly 6½%, the highest point for the year. Then it took rather a sharp decline, and in 1934 it was about 4½%. In '35 it was around 4½%, '36 the same, '37 roughly the same. In '38 it ended around the 5% level. No, I beg your pardon. That is the wrong line again. It ended at that 8% figure I have previously spoken of about 7.8, as it picks up over here——

Mr. Wells: You gave the figures for '38 from that blue pamphlet before.

The Witness: They are correct because they are the actual figures. If you want the actual figures, I think they could be produced. That would be much more satisfactory than the list.

By Mr. Martin:

Q. Were you talking about fifteen railroad bonds? A. I was talking about fifteen railroad bonds.

304

Q. When does the period begin you were talking about? A. 1900.

Q. Have you a list of the bonds that constitute that list? A. Let's see.

Q. Constituted it in 1900. A. I doubt that I have. I can check in a minute. (Pause) No, the list——(pause)

Q. What? A. I can't exactly say how they were constituted in 1900, but I have a complete list of the railroad bonds which are in the index at the present time, and a historical reference to the bonds which previously have been included in the index.

305

Q. A historical reference? A. Yes, as to the period in which they were continued in the index.

Q. You mean the fifteen railroad bonds in the index are not always the same railroad bonds? A. No, sir, they are constantly changing.

Q. They are? A. Yes, sir.

Q. And for all we know, the original list in 1900 might have all gone into default, might they? A. Yes, sir.

Q. Every single bond in that fifteen might be in default now, mightn't it? And you are familiar with bonds? A. Yes, sir.

306

Q. What happens to the yield on a bond after it gets to be a bad risk? A. It gives a tremendous rate.

Q. The yield goes up? A. Yes, sir.

Q. The worse the bond is, the higher the yield, isn't that so? A. Yes, sir.

Q. And as to the bonds in the list, if any did go into default, got rottener and rottener, the yield would get higher and higher. A. That is right.

Q. You don't know if all fifteen of the original bonds might have gone into default; is that right? A. Except for the information in the historical summary.

Carl H. Zipf—For Petitioner—Direct. 307

Q. What does the historical summary say about the original fifteen bonds? A. It does not indicate the original fifteen bonds.

Mr. Martin: All right. That is all.

(At 1:30 P. M., the hearing was continued until Wednesday, March 15, 1939, at 11:00 A. M.)

Wednesday, March 15, 1939, 308
11 A. M.

(The hearing was resumed.)

Mr. Martin: Mr. Zipf, will you take the stand? I have a memorandum here which I have handed a copy of to Mr. Garfield, dealing with damages.

CARL H. ZIPF, a witness called on behalf of Connecticut Railway and Lighting Company, resumed the stand and testified further as follows: 309

Mr. Martin: If your Honor please, I think if we examine Exhibit X-2 it will be a chart to illustrate where we are. On that exhibit, the second column is the annuity coefficient at 4% which is used in the various years shown to multiply $1.00, in order to find the value of a dollar payable in the future as of January 1, 1936. Column 3 is the application of the coefficient in each year to the stipulated rent of 1,049,000, and shows the value of that stipulated rent in all the years from 1936 to 1975. Column 4 is the

310 cumulation of Column 3, and adds up the years as they go along, thus furnishing a minuend from which would be deducted in any year the subtrahend, which consists of the rental value.

Hincks, J.: I thought I understood the chart till you began using these Latin terms, Mr. Martin.

Mr. Martin: I have confidence the Court still understands it. In Column 5, the first three items, I think I will ask the witness this.

Direct examination continued by Mr. Martin:

311 Q. Looking in Column 5 in Exhibit X-2, the first three items are derived from what, Mr. Zipf? A. They represent the income from operations of the C. R. & L. property for the years 1936, '37 and '38, increased by the adjustment of the earning power of three-fourths of the contents of the Sinking Fund at January 1, 1936, plus the additional——

Q. (Interrupting) In other words, those first three items are based on actual figures? A. Yes.

Q. $157,000 bond interest, $49,000 amortization, and the actual operating income for those years? A. That is correct, yes.

312 Q. For those years. And in Column 5, the sum of those three items has had applied to it the annuity coefficient contained in Column 2, so that Column 5 gives the product; is that right? A. Column 5 is the present value, that is, as of January 1, '36, of the amounts which would be payable.

Q. In each year? A. In each year.

Q. And Column 6 is the cumulative amount of that value for the period that ends December 31, 1938? A. That is correct. That is, the third figure is the cumulative total of those three years.

Q. What does Column 7 represent?

313

Hincks, J.: Just a minute, Mr. Martin. Before we leave 5 and 6, aren't you going to cover the composition of the items for the years subsequent to 1938?

Mr. Martin: Yes, but my other factor in the subsequent years has been objected to because it was a theoretical factor, so that I want to get rid of these first three lines first.

Hincks, J.: All right.

By Mr. Martin:

314

Q. Now, in Column 7 you have subtracted the equivalent item on each line in Column 5 from the item in Column 3 on the same line, have you not? A. That is correct.

Q. That is to say, assuming that Column 7 shows the discounted rental value for the year on the line which it is, you subtracted that from the discounted rent value, and the difference is contained in Column 7 for each year; is that right? A. That is right.

Q. And Column 8 is the cumulative amount, as shown in the other cases, of the total for the end of any particular year that is taken; is that right? A. Yes.

315

Mr. Martin: Now, I remark that there is another item amounting to something over $9,000, which was shown on Exhibit X-3, which was the actual loss or damages for the period between December 18 and December 31, 1935; that is to say, the period between the rejection of the lease and the start of the year 1936. That amount, $9,694.33, if added to the third item in Column 8, would give the present value of the total damages sustained by the rejection of the lease, based on actual figures up to December 31, 1938.

316 *Carl H. Zipf—For Petitioner—Direct.*

By Hincks, J.:

Q. Is that so? A. That is correct, yes.

Mr. Martin: Thank you. Now, I offer Exhibit X-2 in evidence, with the understanding that the figures subsequent to the first three lines in Columns 5, 6, 7, 8, 9 and 10, are not accepted as yet in evidence. Let me see. Have you the original?

Hincks, J.: Read the offer again, Mr. Phelps.

317 (The reporter read as follows: "Now I offer Exhibit X-2 in evidence, with the understanding that the figures subsequent to the first three lines in Columns 5, 6, 7, 8, 9 and 10, are not accepted as yet in evidence."

Hincks, J.: Are you going to abandon the remainder of the exhibit?

Mr. Martin: No, I am going to talk about the remainder of the exhibit. If I can get this much in, I have proved all the damages based on actual figures. Then I have got to extrapolate the rest by drawing off a normal year.

318 Hincks, J.: If you are going to work for the rest, why don't you make your offer at a later date?

Mr. Martin: I will.

Hincks, J.: If it all goes in, it will make a simpler record, and if any objection should be sustained it would be time enough then to make your limited offer, wouldn't it?

Mr. Martin: All right, sir.

Now, with regard to Exhibit 6, which was excluded from evidence, I think it may be that I have lead the Court into a misunderstanding of the purpose of Exhibit 6. This exhibit applies Mr. Garfield's present-tense formula to the years 1924 to

319

1935, inclusive, and uses the figures contained in the Public Utilities Commission reports of the Connecticut Company to try and find out what proportion of the income of The Connecticut Company during those years is properly attributable to the C. R. & L. properties. The average of the fifteen-year period in Exhibit 6 is $235,923.51. The exhibit is offered, not as mathematical proof that that is inevitably the year, but as some evidence that that is somewhere near the normal year.

I invite the Court's attention to the memorandum 320
which I have submitted, in which it says, for instance, quoting from Sedgewick on Damages:

"Courts and juries act on probable and inferential as well as direct and positive proof in these matters."

I also remark that the Court of Appeals in the Second Circuit, by Judge Hand, speaking of so-called future damages through breach of the lease, says:

"Some approximation of the damages must be made, the objections to which do not seem to me practically insuperable. I had rather impose such hazards upon the creditors, so far as they are not 321
actually possible of calculation, than to dismiss the lessor with nothing."

The Supreme Court says in Eastman Kodak Co. of N. Y. v. Southern Photo Materials Co., 273 U. S. 359 at 378——

Hincks, J.: That is a tort case.

Mr. Martin: No, it is a net profits case.

Hincks, J.: Growing out of an anti-trust case.

Mr. Martin: Yes, that is true. But I submit that the principle is the same.

Hincks, J.: No.

Mr. Martin: No?

322 *Carl H. Zipf—For Petitioner—Direct.*

Hincks, J.: I think the principle is to be shaded in a tort case. The theory of those tort cases is that there is a punitive consideration which would not apply in a contract case.

However, I have no quarrel with the case you have cited, Mr. Martin, but I do not think you have laid a basis for it as yet. I do not say that approximation is not enough, but I do not think you have even got approximation yet. I do not think I can, on the present state of the record, concede that evi-
323 dence, if there be evidence, as to a period in the trough of the depression, is even an approximation of a condition existing ten years before.

Mr. Martin: Well, your Honor, Mr. Wigmore says in Section 437, I think, that presumptions run backwards as well as forwards. He says that if anyone were to observe Mount Everest, he would be reasonably justified in supposing that it had been there fifty years before and would be there fifty years hence. He also says that anyone observing a soap bubble would not be justified in supposing it was there an hour ago or would be there an hour hence.
624 And the matter rests in the discretion of the Court. I am making my appeal now to the discretion of the Court because the Court himself is here as the trier of the fact; and if I produce a ratio which was true for one year, ratios are not the things that change.

Hincks, J.: The question is whether ratios have to do with soap bubbles or mountains. I do not know which we are dealing with here. For instance, the ratio might be thrown out of kilter if any substantial abandonment had occurred in the previous period.

Mr. Martin: That is true, but the property was operated during the period by the subsidiary of the

325

New Haven Railroad, and if anything like that occurred, they should have a full opportunity to bring it out for the benefit of throwing discredit or of impeaching the evidence which I now propose to submit. And I only submit this as one of the interesting facts which has something to do with it, because I propose to submit a whole series of ratios and a whole series of periods, so that the Court can choose whatever he wants, whatever he thinks is fair. But I do think this has something to do reasonably, even if it is only circumstantial evidence, with the matter of how much probably the property was earning in the past. Now, the reason why I am trying to get this long period of time before in, instead of simply relying on the three years that I operated the property, is because I suppose that, the longer period I can produce in the past, the more justified the Court will feel in projecting the damages into the future.

326

Hincks, J.: I think that is valid.

Mr. Martin: I think that is something that obviously is common sense. When the New Haven Railroad relied on Mr. Garfield's statement for the purpose of rejecting the lease, apparently ratio and statement were based on one year. And, on the figures which I have gone over since last time, it is evident that it was based on the year 1934, because the figures come out exactly in his ratio, for the year 1934.

327

Now, if the Court was satisfied to reject this lease on the foundation of one year's experience when there was a long term left, isn't it reasonable for me to take exactly the same ratio and say to the Court, "This must be somewhere near an approximation of my damages."?

328 I do not say it is correct, but I say that this is an interesting fact which the trier of fact might take into consideration. And I want it to go into evidence, not as absolute proof of anything, but as an interesting fact which the trier of fact may take into consideration if he thinks it is of any importance. And the trier of the fact here being the Court, he is perfectly able to say after it is in, "I do not think it is of importance," or "I do think some consideration ought to be given to it." And the trier of the fact is also justified under the cases in arbitrarily increasing or decreasing the damages as shown by the mathematical figures.

329

One court, after arriving, for instance, at a supposedly exact figure, thought it was too large and cut it in two, just arbitrarily cut it in two.

Now, if that is the problem and that is the way a trier of fact is authorized to treat the problem, I think my Exhibit 6 becomes interesting. And I want to put it in evidence; and as for its weight, I leave it to the Court.

Hincks, J.: Well, what do you say, Mr. Garfield?

330 Mr. Garfield: I am not quite sure just what Mr. Martin is talking about, but I suppose he is confining his remarks to the figures that he has derived by the application of my statement back in 1935. To that, I would say that if your Honor were asked to decide whether Mount Everest was there fifty years ago or whether a soap bubble was in existence one hour ago, you would not accept a presumption, because it would not be the best evidence. It would be so easy to prove whether, as a matter of fact, those things were true. Presumptions in the past are not very interesting, because they are not the best evidence. That is one reason why they are not used. Now,

331

there is no use in using presumptions for 1924 when we have the actual figures, and we have given them to Mr. Martin.

I object to this admission.

Mr. Martin: Of course, Mr. Garfield has assumed that the actual figures he has given to me are correct, whereas I do not believe they are. I am going to try to find out today. There is no question about every single figure in Exhibit X-6 being correct except the application of the ratio, and the ratio itself is a matter of approximation. And it is a pretty near approximation, because the ratios that Mr. Garfield did give me the other day are not very different from this.

332

Hincks, J.: There you are talking about something else. If you want to put in competent evidence that it is pretty near, why then I would have something.

Mr. Martin: That is what I want to do.

Hincks, J.: All right, put it in. It is not in yet, and I do not think I should admit this until it is.

Mr. Martin: That this is pretty near?

Hincks, J.: Yes.

333

Mr. Martin: Well, the pretty-near part of it depends on the presumption that is reasonable, I submit, that ratios do not change much.

Hincks, J.: I will sustain the objection in the present state of the record.

Mr. Martin: Have you Mr. Garfield's list of ratios?

The Witness: This is the original. (Hands paper to Mr. Martin.) I have a copy of it.

Mr. Martin: I offer in evidence this document, and state that it was produced by counsel for the New Haven Trustees at the last hearing, and I offer

334 it in evidence for the purpose of showing that the ratio which I have used in X-6 is approximately similar to the actual ratios worked out by the New Haven Railroad. The ratio, if your Honor please, which I have used is 30% of the total operating revenues, and 33⅓% of the total operating expenses; so that you see it is bounded on both sides by the actual ratios calculated by the New Haven.

Hincks, J.: Is there any objection to this offer?

Mr. Garfield: No, sir.

335 (Exhibit X-11: The Connecticut Company: Percent of Connecticut Railway and Lighting Company to Connecticut Company System Total.)

Mr. Martin: I now submit that I have shown that the ratios which I have used in Exhibit 6 are approximately correct, near enough to be of interest to the trier of fact, and so I offer in evidence Exhibit X-6.

Mr. Garfield: I object.

Hincks, J.: Before I can rule, I will have to ask you to explain how this last exhibit, X-11, compares with the formula or the result of the formula shown on X-6. I do not understand the correlation.

336 Mr. Martin: The figures in X-6 are figures that are taken from the Connecticut Company's own books, with the exceptions of those figures which are produced by the application of a ratio. The ratio was based on Mr. Garfield's statement in which he said that 30% of the total operating revenues—you see, that is the first column in X-11—30% of the operating revenues of the Connecticut Company were derived from the C. R. & L. property. Is that clear to your Honor?

Hincks, J.: Yes. Where should the first column in X-11 be compared on X-6?

Mr. Martin: Nowhere.

337

Hincks, J.: Oughtn't it to be compared with the top line on X-6?

Mr. Martin: No, sir; it is a ratio. There are no ratios on X-6 anywhere.

Hincks, J.: I see. All right.

Mr. Martin: I invite your attention to the last line of the last note on X-6, where your Honor will see that the application of the ratio is thus: from 30% of the railway operating revenues was subtracted 33⅓% of the operating expenses here.

Hincks, J.: Revenues are shown. 338

Mr. Martin: Yes. Let me begin this over again, your Honor. I have gone too fast. The Connecticut Company operated its own property and the C. R. & L. property from 1924 to 1935. The problem now is to find how much of The Connecticut Company's income was due to the C. R. & L. properties that it was operating. Now, there is not any single answer to that. What Mr. Garfield said was, "Well, of the total operating revenues of The Connecticut Company, 30% of them are derived from the C. R. & L. property," it appears that they run from 32.52 to 29.69. In other words, they are on 339 both sides of that 30% that Mr. Garfield mentioned. Do you see?

Now, having got the total operating revenues of the C. R. & L. property by taking 30% of the total operating revenues of The Connecticut Company for this period, we have got to subtract from those gross revenues the proper proportion of the gross expenses which are to be allocated to the operation of the C. R. & L. properties. That ratio was different from the 30%. It was 33⅓%. In other words, the operating ratio of C. R. & L. was less favorable than the total operating ratio of The

340 Connecticut Company. Their own properties were more profitable than ours. So then we took as our ratio to multiply the expenses by, 33⅓%, and that you see again, is within the limits of the ten-year period listed in X-11, which goes from 31.63 up to 34.54.

What I am doing now is to try and convince the Court that Mr. Garfield's ratio is sufficiently reasonable.

Hincks, J.: I think you have convinced the
341 Court, subject to what Mr. Garfield may say. It seems to me that this offer brings X-6 within the proper bounds of reasonable approximation, Mr. Garfield. Why not?

Mr. Garfield: Figures are remarkable things, your Honor. In addition to giving Mr. Martin the ratios, we also gave him a statement of the actual figures actually worked out for those years. As a matter of fact, we did not take the ratios and apply them to the total figures and get the results which we subsequently gave Mr. Martin. What we did back in 1935 was to take the actual figures and
342 divide them, and having divided them we worked out the ratios to see what the ratios were. The criticism that I make with Mr. Martin's present offer is that, as we have given him the actual figures from which we worked backward to get the ratios, the best evidence that he could use would be the actual figures. He is now trying to take the ratios and take an average of those ratios, as if it were an average, which it isn't, and say that that average would be true for every year. Now, I have before me both sets of figures, and there is no year in which the results of the actual allocation coincide

with the results of Mr. Martin's theoretical computation.

If it would be of any help to the Court to have something which is as poor an approximation as Exhibit X-6, in addition to having the actual figures, I do not know that I should object, but I do object because the actual figures are the best evidence and these approximations are not as good.

Hincks, J.: It seems to me that that objection is directed to the weight rather than the admissibility. I think X-11 qualifies X-6 with the possible 344
exception of the year 1924 that is not covered on Exhibit X-11.

Mr. Martin: Oh, yes, quite.

Mr. Garfield: May I make one further statement about X-11, as it does not plainly appear from the heading. X-11 does not deal at all with taxes. It is simply gross revenues and operating expenses other than taxes, and consequently the treatment of taxes in X-6 on the basis of X-11 is entirely out of line with our treatment of taxes. But that is only one of many criticisms. Your Honor
will appreciate, of course, that if you apply certain 345
ratios to one set of figures you will get one result. If you apply them to another set of figures you will get a different result. I was just working at some figures to illustrate. If you assume revenue of $100, expenses of $90, the net would be $10.00. If you take 30% of the revenues, you would have $30. 33⅓% of the expenses, you would have $30. And the net would be zero, assuming that that was the C. R. & L. proportions in that year.

Now, if you take another year when the revenues were $100, the expenses were $60, the net would be $40. 30% of the revenues would be $30. 33⅓%

of the expenses would be $20. And the net of C. R. & L. would be $10. In that year, C. R. & L. would have ¼ of the entire net. In the first year, they would have zero percent of the net. And yet you have used the same ratios, which I state merely to illustrate that an average of ratios does not produce the correct mathematical result when applied to all the figures on which the ratios are based. I think Mr. Zipf will bear me out in that.

Hincks, J.: I think the exhibit is admissible.

347 Mr. Garfield: May I have an exception?

Mr. Martin: Exhibit 6 is received in evidence. Will you make a note of it, Mr. Pickett?

Hincks, J.: Will you erase the "Identification"?

(Exhibit X-6 for identification marked Exhibit X-6 in evidence.)

By Mr. Martin:

Q. Now, Mr. Zipf, have you Exhibit 6 up there? A. Yes.

Q. The average of the operating income of C. R. & L. as shown for the years 1924 to 1938, inclusive, on Exhibit 348 6, is what? A. I didn't get your question exactly, Mr. Martin.

Q. Well, what is the average year? (Pause) Have you that Exhibit 6 there? A. Yes.

Q. Here it is. A. You speak of the average for the years 1924 to '35.

Q. '24 to '38, I said. A. I misunderstood. I didn't get the last figure.

Q. The question was the years 1924 to 1938. A. The average of those years, based upon the figures shown in Line 6, is $235,925.51.

349

Q. And that average includes the actual operating figures for the years 1936, 37 and 38, does it not? A. That is correct.

Now, going back to Exhibit X-2 in Column 5, I invite your attention to the fourth item which is opposite the line of the year 1939. The item I have in mind is $378,394.09. A. Yes.

Q. That item consists of approximately $157,000 in bond interest, $49,713.75 amortization instalment shown by Exhibit X-1, and this last item of $235,925.51, supposed, for the time being, to be the income for a normal year 350 shown by the averages of the years 1924 to 1938 from the operation of the C. R. & L. property. Is that correct? A. That is correct.

Q. And those items that I have read to you add up to $442,667.57. Why is it that the item in the fourth line of Column 5, instead of that figure, is only $378,394.09? A. Well, the item of $378,394.09 is placed on deposit at January 1, 1936. The compound interest of 4% will amount, at the end of 1939, to the 400 and——

Q. Well, all right. A. $422,667.57, discounted.

Q. And another way of saying that is that my figure, when it is discounted at 4% from January 1, 1936, becomes 351 this figure of the fourth item. A. That is correct.

Q. And the fifth item in Column 5, that is compiled similarly? A. That is compiled similarly.

Q. Except that it is discounted through 1940? A. That is correct.

Q. For the year 1940. And so on with all the other items in Column 5; is that correct? A. That is correct.

Q. And going to the fourth item in Column 6, that represents the cumulative value for four years beginning January 1, 1936, of the rental value as thus calculated, discounted to 1939. Is that right? A. That is correct.

352 *Carl H. Zipf—For Petitioner—Direct.*

Q. And so on with all the other figures in Column 6? A. That is correct.

Q. So that, for instance, opposite the 30th year, 1965, you see the figure $7,510,022.79. That would be the accumulated rental value on this basis to the year 1965. Is that right? A. That is correct.

Q. Now we go to Column 7, and that column is the difference in each year between the discounted rental value and the discounted rent for that year. Is that right? A. That is right.

353 Q. And Column 8 is Column 7 carried out cumulatively. Is that correct? A. That is correct.

Q. So that assuming the premises, Column 8 shows the damages claimed by C. R. & L., being the difference between the discounted rent and the discounted rental value, for any particular year up to the year 1975, which may be taken. Is that correct? A. That is correct.

Q. Now, what does Column 9 show? A. Column 9 represents the present value discounted at 4% of income tax attributable to an annual income of $235,925.51, computed at the tax rate effective for the year 1938, because that is the latest available data we have with relation to taxes.

354 Q. And this tax is calculated only on the assumed net income and not on the amortization payment and the bond interest payment which you have included for the credit of the New Haven Railroad. Is that correct? A. That is correct.

By Hincks, J.:

Q. Why, in that connection, didn't you take the average tax rate for the years in question instead of the latest? Wouldn't that have been more consistent with the theory of the exhibit? A. Well, we are dealing now, apparently, with the future, and no one knows what the future rates are going to be. The probabilities are——

355

Q. (Interrupting) Nobody knows what the future income is going to be, but you have forecast that on the basis of an average, have you not? A. Well, we took—that is correct, yes.

Q. Well, then, why shouldn't you forecast the future tax rate on the basis of an average, to be consistent? A. We had no facts with relation to what would be the average taxes reflected in the income account of either the Connecticut Company or of Connecticut Railway and Lighting Company.

356

Q. Well, you have applied a specific tax rate, namely, that of '38, have you not? A. Which is the minimum rate, the absolute minimum which can be payable. It may be as high as 19%.

Hincks, J.: Well, go ahead.

By Mr. Martin:

Q. Perhaps I can develop some testimony along this line. You are a certified public accountant, and you are familiar with tax returns? A. I am.

Q. Have you done tax work since 1913? A. Yes.

357

Q. You have calculated taxes for people who have employed you, perhaps, in every year since 1913? A. Well, I wasn't employed in 1913, but I have dealt with taxes which were affected by the tax rates which were in effect in 1913.

Q. In 1929 there was a reduction of ½ of 1% in personal income taxes. Was that extended to corporations, too? A. I don't recall offhand the rates which were in effect in the various years, because they change from time to time.

Q. Can you recall a single year since 1913, when the Sixteenth Amendment was passed, in which income taxes were reduced? A. There were years when the income tax rates were reduced.

358 *Carl H. Zipf—For Petitioner—Direct.*

Q. Really? A. There were years when they were increased, too.

Q. When were they reduced? A. I can't tell you offhand. If I could have reference to——

Mr. Martin: Well, your Honor has made this point.

Hincks, J.: I didn't make it. It was there.

Mr. Martin: And the answer to it is that we are now looking into the future, and as far as the eye can see there is no prospect whatever of taxes being
359 reduced.

Mr. Garfield: I object to that.

Mr. Martin: However, that is also a matter to be taken into consideration, and the trier of fact, if he supposes that it is reasonable to take an average, can recalculate these figures. The basic figures are now in the record.

Mr. Garfield: I object to Mr. Martin's statement that as far as the eye can see there is no prospect of taxes being reduced.

Hincks, J.: Well, he is probably speaking about his own eyes, Mr. Garfield.

360. Mr. Martin: I now offer in evidence Exhibit X-2.

Mr. Garfield: I object.

Hincks, J.: X-2?

Mr. Martin: I ask that this document be marked for identification and given the number X-2-A.

Mr. Garfield: If your Honor please, I do not know what happened to X-2. I objected to it.

Mr. Martin: I thought it went in, sir.

Hincks, J.: No.

Mr. Martin: Did it go in?

Clerk Pickett: No.

361

Hincks, J.: I was pondering whether I ought to let it in, in view of the somewhat indefinite answers to my last questions.

Mr. Martin: About the income taxes?

Hincks, J.: Yes. I do not see any other objection to it.

Mr. Martin: Let's see X-2.

Mr. Garfield: Do you care to hear from me on the subject, your Honor?

Mr. Martin: Your Honor understands that the 16½% rate listed in the note at the top of Columns 9 and 10, is a minimum rate. That is to say, that is the minimum tax which today can possibly be laid on the C. R. & L. as the result of the receipt of the income which is calculated on the basis which has been explained.

362

Hincks, J.: Do you say, Mr. Martin, that for corporations such as this the minimum was no lower for the entire period back to 1924?

Mr. Martin: No, sir. The period back to 1924 has been used only for one purpose, and that is to try and find a normal year net income. That is the only reason we had to go back there. They have paid our income tax back there.

363

Hincks, J.: Now you are trying to find a normal year net-income tax.

Mr. Martin: Yes.

Hincks, J.: Why shouldn't you use the same yardstick?

Mr. Martin: I think I am. Well, because I think it is unreasonable. I do not think that that is sensible. I think that we all know that there is a debt of 40 billions, that the service of that debt has got to be paid, that taxes are not going down. The Court knows that. If I say that today the corpora-

364 tion income tax is 16½%, it seems to me reasonable to conclude that it is probably going to be that over the next forty years, probably going to be higher. I understand in Germany it is 30%.

Mr. Garfield: I object to that statement.

Mr. Martin: Well, I withdraw it, then.

I think that this is a reasonable thing to do and I admit that looking into the future I cannot tell any more about taxes than I can about income mathematically, but I think that this is an approximation of what is a reasonable conclusion to draw.

365 Hincks, J.: What do you say, Mr. Garfield?

Mr. Garfield: I entirely disagree with Mr. Martin's theory on the rate of the taxes, but I so fundamentally disagree with his whole theory of proving these damages that I find it a little difficult to discuss the rate.

However, there is another fundamental objection to this testimony, so-called, on taxes which is that in addition to income, operating income, and rate, you have to know a great many other things to determine income taxes. Now, I cannot do better

366 than to illustrate from Exhibit X-4. In the year 1936, X-4 shows net income of C. R. & L. of 264,000, which is slightly higher than this supposed average that Mr. Martin is using in X-2. In the year 1937, when Federal income taxes on that '36 income were payable, C. R. & L. paid no income taxes. Now, that illustrates the fact that you cannot determine taxes in vacuo by taking net income and tax rate. You have got to know all sorts of other factors. Were there write-offs? Were there various other things that occurred? Is the company going to be consolidated with another company and make a consolidated return, and have the benefit of deductions

367

in the other company's return? There is so much unknown that even if we could agree that the rate would be 16½% for any definite period, and even if we could agree that the net income would be $235,000, you could still not prophesy the taxes.

Hincks, J.: Isn't this argument, Mr. Garfield, inconsistent with the holding of the Circuit Court with respect to taxes?

Mr. Garfield: No, sir, we have discussed that before. The Circuit Court said that the taxes actually paid—that is all the lease refers to—legally

368

assessed and paid, shall be added. It does not say any theoretical taxes that they would not have to pay if for some reason they did not have to for some year. It simply says that the taxes which they are actually going to have to pay must be included in the taxes. I do not say that they never will have to pay any taxes, but I do say that they cannot possibly prove now what taxes they will have to pay, except what they have already incurred. Those they can prove, of course.

Mr. Martin: I cannot agree that that is what the C. C. A. said.

369

Hincks, J.: Those they have already incurred are shown in the first three lines of Column 9 and 10.

Mr. Garfield: Yes, sir. I am willing to pay those.

Mr. Martin: Well, you understand that those first three are based on actual operating figures. For instance, it is not fair for Mr. Garfield to take 1938 or whatever he did take, some operating year, and say we paid no income tax on them. The point is that this income in our hands, this net income in our possession, is subjected to a minimum tax of 16½%; and its value is obviously more if that tax is taken care of than it is otherwise. Now, it was my original

370 contention, which has been overruled—I still think it was the intention of the Circuit Court also—to calculate this tax not on the net income but on the rental, and that I was to be given tax-free dollars in the form of rental which would have made a very much larger tax. Well, I cannot do that. The ruling, as I understand it now, is that the tax is to be calculated on the supposed income, and I have calculated it on the supposed income. This is the minimum tax. This is what the income is worth,
371 more if a tax is taken care of. I cannot tell exactly what tax will be paid in each year, because I cannot tell for sure exactly what the income is going to be in any future year. This, I suggest also, is another matter to be taken into consideration.

Hincks, J.: Isn't the vice of this offer—of course, I am speaking now just of 9 and 10, columns 9 and 10—that it takes into account only one of the numerous recurrent items in the tax return, namely, net income?

Mr. Martin: That is true.

Hincks, J.: And it takes no account whatever of
372 items of deduction which, so far as actual experience goes for the three years that have actually transpired, operated to completely offset these matters.

Mr. Martin: That is true. Nevertheless, I still think that it is an interesting item to be taken into consideration by the trier of fact in trying to find out what the value of the damages is. It is not offered as evidence that in each year we have got to pay that much taxes. It is offered as a convenience for the Court, to save him a calculation which he might have to make if it was simply left on the basis of the present statutes plus one of these annuity coefficients. Assuming that the tax is 16½%,

this is what it will come to, and that is an interesting item.

Hincks, J.: I think the heading is a misnomer. It says, "Federal Income Tax on 235,000."

Mr. Martin: Yes.

Hincks, J.: Well, it isn't the Federal income tax. It is what the Federal income tax would be if we had the unusual situation of a corporation having a net income from operations, and no other items to return on its report.

Mr. Martin: Your Honor, I am perfectly willing to accept that amendment to the heading. It is quite true. It is what the Federal income tax would be if the income was as shown in the rest of the chart. That is quite true. That is all it can be.

Hincks, J.: Well, I am not quite satisfied with that last remark, "That is all it can be". Isn't it so that there are certain recurrent items in the tax return, and if you can establish an average for income from operations. I do not see why you could not establish an average for other items required in the return. In other words, it seems to me that these columns seem to reflect items that are favorable to the claimant, and have completely neglected items that work the other way.

Mr. Martin: Under the terms of the lease, the New Haven Railroad was required to pay three-quarters of the income tax of C. R. & L. One quarter is paid by the Power Company. We have asked for only three-quarters of it. We are now getting something like $5,000 a year from the Gas and Electric properties as rent from the Power Company. We have not asked the New Haven Railroad under the strict letter of the lease to pay three-fourths of our income tax, because we do not think that is reason-

376 *Carl H. Zipf—For Petitioner—Direct.*

able. What we have tried to do is sit down and find out what really is the amount of money we are likely to derive from the operation of these transportation properties, and find the amount of the income tax on that. And I think this was pretty reasonable, and even generous, because we might have made a partisan argument that three-quarters of our total income tax, which would be far greater than this, ought to be paid. I submit that this is interesting. I do not expect, and am not going to try,
377 to produce figures which are binding on the trier of fact. I have figures here. All my figures are merely interesting because they all deal with the future, and in the end, whatever the trier of fact thinks is reasonable is going to be the net result. I think this would be interesting for a trier of fact to know. I think it ought to go into evidence for that purpose.

Hincks, J.: Whether or not it is interesting it seems to me somewhat misleading, Mr. Martin. I will admit the exhibit, except as to columns 9 and 10, the first three items in them, and let you have
378 an exception as to the balance.

Mr. Martin: Thank you.

Mr. Garfield: May I have an exception as to the first eight columns?

Hincks, J.: Very well.

Mr. Martin: This might be cured.

Hincks, J.: You can offer it later.

Mr. Martin: If I can get an average.

Hincks, J.: If anything comes in to affect it.

Mr. Martin: Of course, I cannot get an average income tax that means anything because it was paid on the consolidated return up until 1935. In other words, there is no operating basis except in Exhibit 6. Let's see Exhibit 6. No, this is not the one.

379

Mr. Garfield: When your Honor comes to consider this matter, I would like to call your attention to the order on mandate which was entered on December 30, 1938, and to Memorandum of Decision regarding it, which related to the subject of taxes, a different computation from this one but based on precisely the same theory on which your Honor decided that such evidence was not sufficient to prove taxes. And no appeal was taken by either side from that Order or Decision. The time for an appeal has expired.

380

Hincks, J.: I do not think that is, however, necessarily conclusive, because that Order on Mandate was written on the theory that future damages were outside the reach of this Court. And now that that theory has been revised by the Supreme Court, we may have another situation.

Mr. Garfield: That is true, your Honor. But the point of this Memorandum of Decision which you handed down on the 30th of last September was that as to the offered proof of taxes for a period which was future at the time the evidence was offered, although it had already become past by September, 1938, the evidence was insufficient to prove taxes. And you were interpreting the Circuit Court of Appeals' language in making that order and in writing that opinion. Now, the theory on which the taxes were proved for what was then a future period, was the same as the theory which Mr. Martin is now trying to use, and your Honor disposed of that theory in an order and in a decision from which no appeal was taken. To that extent, to the extent which you were dealing with that question, there is nothing in the Supreme Court opinion which would modify that situation.

381

382 *Carl H. Zipf—For Petitioner—Direct.*

Hincks, J.: All right. We will note, then, that my ruling is confirmed by my own prior decision, at least.

Mr. Garfield: From which Mr. Martin did not appeal.

Mr. Martin: I ask that this document be marked for identification, Exhibit X-2A.

(Exhibit X-2A for identification: Two sheets: Statement Regarding Amount of Damages Sustained by Connecticut Railway and Lighting Company for
383 the Forty-Year Period January 1, 1936, to December 31, 1975, on Account of the Rejection of the December 19, 1906 Lease by The New York, New Haven and Hartford Railroad Company and Subsequent Agreements Related Thereto.)

Mr. Martin: Have you got this? (Hands paper to the witness.)

By Mr. Martin:

Q. Mr. Zipf, this document was compiled by you or under your direction? A. It was.

384 Q. And columns 1, 2, 3, and 4 are the same as the similarly numbered columns in Exhibit X-2? A. That is correct.

Q. And the first three items in columns 5, 6, 7, and 8 are likewise the same as in X-2? A. That is correct.

Q. Then will you explain how you calculated the fourth item in Column 5, which I think will be a key to what this is? A. The average annual income for bus operations for the year and a half from July 1, 1937 to December 31, 1938, was determined to be $165,537.67. And to that average was added the sum of the annual earning power of three-fourths of the contents of the Sinking Fund, $157,028.31 and three-fourths of the annual payments required to be made into

385

the Sinking Fund under the indenture of $49,713.75, making a total earning power or annual rental value of $372,279.73.

And that amount, discounted from December 31, 1935, January 1, 1936, is the amount which appears as Item 4, Column No. 5. And likewise the succeeding amounts represent the discounted value of an annual earning power of $372,279.73 for the respective years.

Q. Did you also write the note attached to this exhibit? A. Yes.

Q. Is that note correct? A. The note is correct, yes, based upon the facts stated.

386

Q. This exhibit, then, is supposed to show damages, that is to say, the difference between the discounted rent and the discounted rental value, to any particular year, based on a year of which the source is one year and a half of complete bus operation. Is that correct? A. That is correct.

Q. And the operating income, which is the only factor which differs from Exhibit X-2, is here $165,537.67. A. That is correct.

Q. That is annual, is it? A. That is assumed annual income from bus operations for the period mentioned.

387

Hincks, J.: Is that assumed income or actual?

The Witness: It is actual.

Mr. Martin: It is annual income based on an eighteen-months period of actual.

Hincks, J.: What is the period?

Mr. Martin: The period is from June 30, 1937, to January 1, 1939, eighteen months ending the first of this year, which is a year and a half of bus operation, which is all we have had of 100% bus operation, but which is supposed to be important or interesting because that is what, as far as we can see,

we have got to do in the future, and not trolley properties.

Hincks, J.: In other words, the exhibit indicates your damages at a little under $14,000,000, provided every year in the future is as bad as the critical year that is the basis of the exhibit.

Mr. Martin: Yes. Yes, sir. That is it.

I offer Exhibit X-2A in evidence.

Mr. Garfield: I object.

Mr. Martin: Oh, excuse me. The same difficulty
389 arises with regard to columns 9 and 10. And I will offer them in evidence and the Court can make such ruling as it wants.

Mr. Garfield: I object to the entire exhibit, your Honor. One ground of my objection is the same as that which I stated on Monday in objecting to the last three columns of Exhibit X-4; namely, that we should not be penalized because through no fault of ours the hearing has been held at this time instead of at the time when it normally would have been held, namely, June 30, 1937.

The second ground of my objection is the same
390 as my objection to Exhibit X-2; namely, that the figures do not have any weight, are not entitled to any weight, and are misleading, and therefore should be excluded as indicating anything for the future. And I also object to columns 9 and 10, which relate to taxes.

Hincks, J.: Well, it appears to me that if the Claimant had rested content with Exhibit 2, indicating damages of 8,000,000 plus, which I suppose should be adjusted by the deletion of columns 9 and 10, if they are not eventually worked in——

Mr. Wells: About 12,000,000, your Honor.

Hincks, J.: 12,000,819. Well, what I started to observe was this, that if the Claimant had rested

391

on X-2, why, then the Trustees might very well have said by way of argument that X-2 was based in part on trolley operation, and the Claimant had indicated a preference for bus operation; presumably, bus operation would be more profitable and would substantially reduce the damages. That might have been a rather valid argument without the offer of this present exhibit.

I think I ought to admit it. But I think I may fairly state that the ruling does not imply that I necessarily shall treat it as stating the precise measure of damages. I think it is merely one admissible item. I think I should adhere, however, to my ruling on the Federal tax question and admit it without Columns 9 and 10. Each side may have an appropriate exception, cross exceptions, if you prefer.

392

Mr. Martin: I ask that this document be marked for identification "X-2AA".

(Exhibit X-2AA for identification: Statement Showing Net Operating Income before Federal Income Taxes of Connecticut Railway and Lighting Company Transportation Properties for the Last Half of the Calendar Year 1937 and for the Calendar Year 1938 and Such Income for the Average or Normal Year During Such Period.)

393

By Mr. Martin:

Q. Mr. Zipf, I show you Exhibit X-2AA and ask you if that was a calculation which you made? A. Yes, I did.

Mr. Martin: I offer it in evidence. It is merely explanatory of the calculation in X-2A.

Mr. Garfield: My same objection as before.

Mr. Martin: I ask that this document be marked for identification, X-2B.

394 *Carl H. Zipf—For Petitioner—Direct.*

Hincks, J.: I make the same ruling here. I will admit X-2AA.

(Exhibit X-2AA for identification marked Exhibit X-2AA in evidence.)

Mr. Martin: I beg your pardon, then. I did not know you were still on it.

Mr. Garfield: May I have an exception?

(Exhibit X-2B for identification: Statement Regarding Amount of Damages Sustained by Connecticut Railway and Lighting Company for the Forty-
395 Year Period January 1, 1936, to December 31, 1975, on Account of the Rejection of the December 19, 1906 Lease by The New York, New Haven and Hartford Railroad Company and Subsequent Agreements Related Thereto.) (Two Sheets.)

Mr. Martin: X-2AA is in. Did you get that?

Clerk Pickett: Yes.

Mr. Martin: For your Honor's information, may I say that this document is like all the X-2 exhibits. This one is based on three years of actual figures. These are the three years, two of which C. R. & L.
396 has operated the company, and one of which The Connecticut Company operated it and was able to separate our figures from theirs.

By Mr. Martin:

Q. Mr. Zipf, I show you Exhibit X-2B and ask you if that was compiled under your direction? A. It was.

Q. And the columns numbered 1, 2, 3 and 4 are the same as the equivalent columns in Exhibit X-2? A. That is correct.

397

Q. And the first three items in columns 5, 6, 7 and 8 are likewise the same? Are they the same as the equivalent columns in Exhibit X-2? A. They are.

Q. And in what way does the fourth item in Column 5 differ from the fourth item in a similar column in Exhibit X-2? A. The fourth column differs——

Q. I can't hear you, Mr. Zipf. A. The fourth item differs only from the fact that in place of the figure of $235,935.51 representing the average earning over a fourteen-year period or a fifteen-year period, we have taken the average over the three-year period of actual operation since January 1, 1936, to be $191,870.04. Otherwise, the amounts included are the same as those included in the computations in schedule or exhibit X-2.

398

Q. Had you finished? A. Yes.

Q. Did you write the statement annexed to this exhibit? A. Yes.

Q. Is that correct? A. That is correct.

Q. So that the exhibit is based on actual figures for the year 1936 and 1938, inclusive, and the only different factor in those figures is the amount taken for the net income of the normal year? A. That is right.

Q. That is, in estimating the so-called rental value, the two items of bond interest and amortization payments remain the same, the only difference being the net income? A. The net income from operations.

399

Q. Ignoring columns 9 and 10 for the moment, all these figures, then, are actually based on real operating figures, without resource to ratios or estimates; is that correct? A. That is correct, yes.

Mr. Martin: I offer Exhibit X-2B in evidence.

Mr. Garfield: All of the same objections.

Hincks, J.: Same rulings.

Mr. Garfield: Exception.

400 *Carl H. Zipf—For Petitioner—Direct.*

(Exhibit X-2B for identification marked Exhibit X-2B in evidence.)

Mr. Martin: I ask that this document be marked for identification X-2BB.

(Exhibit X-2BB for identification: Statement Showing Net Operating Income before Federal Income Taxes of Connecticut Railway and Lighting Company Transportation Properties for the Years 1936-1938, inclusive, and Such Income for the Average or Normal Year during Such Period.)

401

By Mr. Martin:

Q. Mr. Zipf, I hand you document X-2BB, and ask you if you compiled that? A. I did.

Q. And what is it? A. It represents a statement of net operating income before Federal income taxes of transportation properties of C. R. & L. for the years 1936, 37 and 38.

Q. Is it correct? A. Yes, it is correct.

Mr. Martin: I offer it in evidence.

402 Mr. Garfield: Same objection.

Hincks, J.: Same ruling.

Mr. Martin: I beg your pardon.

Hincks, J.: Same ruling, admitted.

Mr. Garfield: Exception.

(Exhibit X-2BB for identification marked Exhibit X-2BB in evidence.)

Mr. Martin: I ask that this document be marked for identification X-2C.

(Exhibit X-2C for identification: Two sheets: Statement Regarding Amount of Damages Sustained by Connecticut Railway and Lighting Company for the Forty-Year Period January 1, 1936, to December

403

31, 1975, on Account of the Rejection of the December 19, 1906 Lease by The New York, New Haven and Hartford Railroad Company and Subsequent Agreements Related Thereto.)

Mr. Martin: For the Court's information this is like the other X-2 exhibits. It covers a ten-year period, of which three years are our own figures and seven years are based on figures actually supplied to us at the last hearing by counsel for the New Haven Trustees.

By Mr. Martin:

404

Q. Mr. Zipf, I show you Exhibit X-2C, and ask you if you compiled this? A. Yes.

Q. And columns numbered 1, 2, 3 and 4 are the same as in the other X-2 exhibits? A. That is correct.

Q. And the first three lines of columns No. 5, 6, 7, and 8 are likewise the same as in Exhibit X-2B? A. Yes.

Q. And those figures in those columns are derived from actual operation by C. R. & L. of the transportation properties during 1937 and 1938, and from actual operation during part of 1936, the balance of the figures being supplied by The Connecticut Company, which was operating partly during 1936. Is that correct? A. That is correct.

405

Q. In other words, those first three lines are the same as in the other exhibits? A. Yes.

Q. Now, looking at Line 4 in Column 5, where is that figure derived from? Talk quite loud, please. A. That represents the discounted value of $508,491, which represents the annual rental value assumed for the years 1939 and thereafter, based upon the ten-year average earnings of $301,749 and the addition of the earning power of three-fourths of the contents of the Sinking Fund, $157,028.31, and three-fourths of the annual payments required to be made in the Sinking Fund, $49,713.75.

406 *Carl H. Zipf—For Petitioner—Direct.*

By Hincks, J.:

Q. Which factor in that figure differs from the corresponding factor and the corresponding figure on Exhibit X-2? A. The figure of 301,749, which is the average earnings for the ten years, differs from the figure in X-2 of $235,925.51.

Q. How is that figure made up, the factor that is used in this exhibit? A. It includes the results of operations as indicated for the years 1936, 37 and 38, and the operating
407 results for the seven years prior as furnished by New Haven Railroad for the C. R. & L. properties.

There is a statement which shows the enumeration of the results for the various years.

Q. In other words, as I understand it, the only difference in the basis is that here, instead of using the 33% in the 30% ratio of revenues and expenses which was used for Exhibit X-2, this is based on actual figures. A. We have actual figures for a ten-year period.

Q. Isn't it the same period in each case? A. Well, in the first instance, in the X-2, there is a fifteen-year period, whereas this is a ten-year period.

408 Q. Well, which ten years are involved in this? A. The most recent ten years from 1938 backwards.

Hincks, J.: Very well. Is this offered?

Mr. Martin: Yes, I wanted to ask him one more question.

By Mr. Martin:

Q. In other words, Mr. Zipf, the figure of $301,749 is an average of the ten-years' net income derived from three years of operation by C. R. & L., and seven years of operation by The Connecticut Company, the seven years' figures

409

being given us by counsel for the New Haven. Is that correct? A. That is right.

Q. And did you compose the statement? A. Yes.

Q. And is that correct? A. That is correct.

Mr. Martin: I offer Exhibit X-2C in evidence.

Mr. Garfield: Same objections.

Hincks, J.: Same ruling.

(Exhibit X-2C for identification marked Exhibit X-2C in evidence.)

410

(Pause.)

Hincks, J.: I am complaining to the Clerk that I will never be able to read your handwriting, Mr. Martin, two weeks hence.

Mr. Martin: Excuse me, sir.

Clerk Pickett: Mr. Martin assumed my duties.

Mr. Martin: This is X-2CC.

(Exhibit X-2CC for identification: Statement Showing Net Operating Income before Federal Income Taxes of Connecticut Railway and Lighting Company Transportation Properties for the Years 1929-1938, Inclusive, and Such Income for the Average or Normal Year during Such Period.)

411

By Mr. Martin:

Q. Mr. Zipf, I show you Exhibit X-2CC, and ask you if you made up that statement? A. Yes.

Q. And this statement contains the net operating income based on actual figures for the years 1929 to 1938, inclusive? A. Yes.

Q. I beg your pardon. A. Yes.

Q. And the average? A. And the average.

412 *Carl H. Zipf—For Petitioner—Direct.*

Mr. Martin: I offer this statement in evidence.
Mr. Garfield: Same objection.
Hincks, J.: Overruled. Admitted.

(Exhibit X-2CC for identification marked Exhibit X-2CC in evidence.)

Mr. Martin: I ask that this be marked X-2D.
(Exhibit X-2D for identification: Two sheets: Statement Regarding Amount of Damages Sustained by Connecticut Railway and Lighting Company for the Forty-Year Period January 1, 1936, to December
413 31, 1975, on Account of the Rejection of the December 19, 1906 Lease by The New York, New Haven and Hartford Railroad Company and Subsequent Agreements Related Thereto.)

By Mr. Martin:

Q. Mr. Zipf, I show you Exhibit X-2D, and ask you if that was made up by you? A. Yes.

Q. And the first four columns are the same as in exhibit X-2? A. That is correct.

Q. Likewise, the first three lines of columns 5, 6, 7 and 8? A. That is correct.
414
Q. Are the same as in X-2? A. Yes.

Q. How was the fourth item in Column 5 derived? A. The fourth item in Column 5 is derived in the same manner as that in Exhibit X-2, except that the average earnings for a fourteen year period is used in place of the average used in Exhibit X-2, so that in place of $235,925.51 included in Exhibit X-2, we have used an average of $382,809 in Exhibit X-2D. Otherwise——

By Hincks, J.:

Q. I don't understand the composition of the figure that was used here. A. This represents an average for a fourteen-year period, three years of which represent the

415

years 1936, 7, and 8, and eleven years, or from 1924 or 25, I think it is, to '35, represent information given by the New Haven Railroad, as representing the earnings for that period under the operation by Connecticut Company.

Q. Well, the only difference, then, between this exhibit and the last preceding one is that this covers an eleven-year period instead of a seven-year period? A. Seven-year period.

Q. Under operation by The Connecticut Company? A. That is correct.

416

Mr. Martin: May I say that the reason we drafted up a ten-year period is because in the exhibits filed by the New Haven Trustees before the Interstate Commerce Commission, there are a great many charts based on exactly ten years, and we wished to do exactly the same thing that they did. These exhibits are contained in a volumn entitled "Forecast of Revenues", I think. And one of the charts dealt with the future possibilities of revenues derived from passenger service. Isn't that correct, Mr. Garfield?

Hincks, J.: I do not see what difference it makes.

417

Mr. Martin: All I say is that we tried to do just exactly what they did.

Hincks, J.: What they did proved unsuccessful, apparently, and so I do not see that it is very relevant.

Mr. Garfield: Will you agree that your forecasts are as accurate as ours were in our original plan, Mr. Martin, and entitled to as much weight as they seem now to be able to get?

Mr. Martin: I am not making forecasts. I am leaving it to the Court to make them. I ask that that be marked X-2DD.

418

(Exhibit X-2DD for identification: Statement Showing Net Operating Income Before Federal Income Taxes of Connecticut Railway and Lighting Company Transportation Properties for the Years 1925-1938, Inclusive, and Such Income for the Average or Normal Year during Such Period.)

Mr. Garfield: Have you offered X-2D yet?

Mr. Martin: No.

By Mr. Martin:

419

Q. I show you Exhibit X-2DD and ask you whether that was got up by you? A. Yes.

Q. Does it contain a list of net operating income as shown therein, which is based on actual figures for the last three years, and on figures supplied by New Haven counsel for the first eleven years? A. That is correct.

Q. Mr. Zipf, have you examined the income tax return made to the Federal Government by C. R. & L. for the year 1937? A. Yes.

Q. Have you got it right there? A. I have a copy of it here.

420

Q. What was the taxable income? A. There was no taxable income in 1937.

Q. Was that because of deductions? A. That was because chiefly of one deduction. There was one deduction of $2,826,822 for abandonment of property by C. R. & L. during the year 1937.

Q. For abandonment of property? A. Of property. That resulted in showing an operating loss for tax purposes of $2,386,640. So that the deduction of the loss for abandonment of property results in the elimination of any tax at all during the year for 1937.

Q. Tell me again how much was deducted for the property? A. $2,826,822.

421

Q. How much was deducted, all told, from the taxable income? A. All told, the deductions amounted to $5,781,469.37.

Q. What were the rest of the deductions besides the property damages? Is there a list of them there? A. There is operating expenses. Ordinary operating expenses, it is designated here, $1,648,744.36. Depreciation $364,626.15. Taxes $223,320.47. Interest $451,997.31. Rent 260—No, pardon me. That is repairs. $260,170.30, and rent $3,186.80.

Q. Is the gross revenue stated there for the year 1937? 422
A. Yes, $3,394,828.47. That consists of——

Q. That is all I want to know. The gross was $3,000,000, and the write-offs something over five. A. That is correct.

Q. And the property write-offs for abandonments were — A. $2,826,822.

Mr. Martin: Do you want to examine him?

Cross-examination by Mr. Garfield:

Q. Are those the only property write-offs that C. R. & L. has had since it took the property back? A. I might refer to a preceding return to be sure of that. I don't 423
know, offhand. (Pause.) The 1936 return shows no write-offs for abandonment of property. And the 1938 return has not yet been filed, or will be filed today.

Q. Have you a copy of it there? A. I don't have a copy of the '38 return. It wasn't completed when I left.

Q. Do you know what the abandonments shown on that are? A. On the 38 return? I know there is a taxable income which will result in the payment of tax considerably in excess of the amount that is taken or claimed as deduction on the 1938 statement of income.

Q. But you don't know even approximately what the abandonments were? A. In '38?

424 Q. In '38? A. No.

Q. When you refer to the tax that will be paid, you haven't the split between the C. L. & P. proportion and the C. R. & L. proportion, have you? A. No.

Mr. Garfield: That is all on that.

Mr. Martin: Wait just a minute, Mr. Zipf.

By Hincks, J.:

425 Q. If you eliminate from the total deductions the item of property abandoned, what would the difference be? Approximately, in round numbers? A. If you eliminate the property abandoned, it would be approximately $440,000 of taxable income for the year 1937.

Hincks, J.: That is all I wanted to ask.

By Mr. Garfield:

Q. Mr. Zipf, will you turn to Exhibit X-4.

Mr. Garfield: It is this large one, your Honor.

426 A. I have it.

Q. Where in that exhibit do you show the net operating revenue of the C. R. & L. from the controversial bus routes which were awarded to the C. R. & L. by the Order of this Court? A. It is included in the first figure shown under the first two columns designated with an "A". I have a reconciliation of the amount of the controversial revenue with the amount of revenue reported by Connecticut Company in reports to the Public Utility Commissions. I could reconcile with Mr. Leete if——

Q. I am not worrying about the reconciliation. I am just wondering where you showed it. You say for the

427

period from December 18 to December 31, 1935, and for the period from January 1—November 15, 1936, you showed that net operating revenue in the two items that are labeled "A" in the first two columns of figures. A. That is correct, yes.

Q. So that the net is included in your figures for those two periods? A. Yes.

Q. And the net for those two periods is included in your figure for the calendar year 1936? A. That is correct, only for the period from January 1, 1936—November 15, 1936.

428

Q. That is true, yes. Where is the net revenue from the controversial bus route operation for the balance of 1936? A. That is shown, if you look in the third column, the fifth item from the bottom, under "Add Adjustments". There is an item there, "Net Earnings of Controversial Bus Routes Turned over to Connecticut Railway and Lighting Company". There is an item of $3,009.88.

Q. That is for the last month and a half of 1936? A. That is correct.

Q. And for 1937 you show it, and 1938 you show it in that same item? A. In that same column. That is just the net operating revenue.

429

Q. How do you explain the fact that the net revenue from those routes for 1938 was only approximately half of that for 1937? A. Well, I can't explain that, except that it was taken from the statement which I understand is submitted by The Connecticut Company to Connecticut Railway and Lighting Company. It is based upon a statement which was furnished by them.

This amount for 1938 shown in the last column is for a nine-months period.

Q. It is not the whole year? A. Not for a year.

Q. Where are the figures for the rest of the year? A. For the rest of the year they are undoubtedly included in operating revenues and operating expenses.

430 Q. You say "undoubtedly". Do you know whether they are? A. They are, yes.

Q. Now, in your Exhibit X-3, the second figure on that exhibit, $22,839.65, is taken from Exhibit X-4, is it not? A. That is correct. The last item on Exhibit X-4 in the first column.

Q. In your Exhibit X-2, where in that exhibit do you reflect the revenue from the controversial joint bus routes? A. If you will turn to the note attached to Exhibit X-2, you will note there is stated in there the amounts earned for
431 the years 1936, 37 and 38. The first item, $246,045.34, agrees with the total shown on Exhibit X-4, at the bottom of the fourth column.

Q. And the same is true of the other figures? A. And the same is true of the other figures. They can all be identified with the last figure on the column in exhibit X-4.

Q. So that for 1936, 7 and 8, by taking the figures from X-4, you have included the joint bus revenues? A. That is correct.

Q. How about the earlier years? A. Which years, Mr. Garfield?

Q. How about the figure that you have used for com-
432 puting your so-called revenue for the years after 1938? A. Well, the figures used for the period after 1938 are taken as an average; that is, on X-2, an average of the statement or exhibit marked X-6, the $235,000 figure.

Q. Well, then, let's look at X-6. Now, omitting the years 1938, 1937 and 1936, where in the balance of X-6 do you include the joint controversial bus route revenue? A. The reports to the Public Utility Commission of Connecticut do not indicate as a separate item any controversial revenue, but since the controversial revenue is included in the total figures of Connecticut Company, there is no way of identifying.

433

Q. In other words, those figures are included in the total system revenues and in the total system expenses? A. Yes.

Q. But you don't know whether you have allocated them to C. R. & L. or not? A. Well, in the allocation, you have taken an allocation based upon the premise stated in this exhibit, 30% of the operating revenues and ⅓ of the operating expenses and taxes.

Q. And that premise being based on the statement which I made in December, 1935, was before the question of the controversial bus routes had been decided, was it not? A. I don't know exactly when the controversial bus revenue was finally decided.

434

Mr. Garfield: The records would show that.

Hincks, J.: Well, this line of inquiry, Mr. Garfield, seems to tie back to Exhibit X-11, which I understand is on ratios based on actual figures from the Connecticut Company.

Mr. Garfield: Yes, sir.

Hincks, J.: And I hope that one or the other of you will let me know whether those figures include or exclude the controversial routes.

435

Mr. Garfield: We will do so, sir. I will say for your information, subject to proof later, that those figures do not include the controversial routes because they were made up in the latter part of 1935, and the claim for those routes had not even been filed at that time, to say nothing of being allowed. But we will show that through the witness.

Mr. Martin: Mr. Garfield, excuse me. I did not understand that. Were you talking about Exhibit X-11?

Mr. Garfield: Yes.

436 *Carl H. Zipf—For Petitioner—Cross.*

Mr. Martin: And ratios shown there do not allocate the controversial bus routes to C. R. & L.

Mr. Garfield: They do not. You see, those figures were made up, Mr. Martin, on December 2, 1935, as stated at the bottom.

Mr. Martin: That is correct.

Mr. Garfield: And that was before you raised that question at all.

By Mr. Garfield:

437 Q. Will you look at Exhibit X-5, please, Mr. Zipf? A. I have it.

Q. There you are dealing with three-fourths of the Sinking Fund. Could you tell me what the total amount of bonds in the Sinking Fund on January 1, 1936, was, of which you have derived three-fourths as being $3,489,000? A. I don't know offhand, but it is my recollection that there is a statement in the previous testimony which shows the contents of the Sinking Fund at that time.

Q. Well, there is a statement showing the contents, or maybe it is three-fourths of the contents, in October, 1935. A. Yes.

438 Q. But in your Exhibit X-5, you have assumed that all of the cash in the Fund was used to buy more bonds? A. Yes.

Q. So that I do not know whether you have said they were actually in the Fund on January 1, '36, or that you have taken it as though they were in the Fund. A. Well, my understanding is the proceeds of the Fund at that time were used to acquire bonds for the Sinking Fund, so that full advantage has been given in the apportioning of the Fund at October 23, 1935, pertaining to cash, and the retirement of those bonds through the operation of the Sinking Fund.

439

Q. Yes, I am not objecting to that. But I am just wondering whether you know how many bonds you had assumed were in the Fund at that time. I suppose you could get it by multiplying this figure by 4/3. A. That would give approximately the amount. (Pause.) I do not have any information as to the exact number of bonds in the Sinking Fund at that time.

Q. Would you tell us what 4/3 of the figure on Exhibit 5 is? A. (Pause.) Before giving effect to any retirements at January 1, 1936, the value would be $4,493,000 par value of bonds in the Sinking Fund, and it would seem as though approximately 160 bonds were brought in for the Sinking Fund at January 1, 1936.

440

Q. And that would make approximately 4,000,653. A. 53,000 bonds.

Q. Now, were there bonds added to the Sinking Fund during 1936? A. You say were there bonds added to the Sinking Fund?

Q. Yes. A. Yes.

Q. Do you know approximately how many? A. No, I don't know offhand.

Q. Under the Sinking Fund agreement, which appears as Schedule B attached to the lease which is an exhibit in this case, there is a provision, is there not, that the bonds in the Fund shall receive interest at the rate which they bear, and that there shall be a payment into the Fund of one-half of 1% of the total outstanding bonds? A. That is my recollection, yes.

441

Q. And that those payments shall be used to purchase additional bonds for the Fund? A. That is correct.

Q. Which bonds may be called at 105 if they cannot be purchased at a less price? A. That is my understanding.

Q. And that agreement, so far as you know, is being carried out? A. Yes.

Q. That is based on an agreement between what parties? A. You mean the agreement to purchase bonds for the Sinking Fund?

Q. Yes, the Sinking Fund agreement. A. Well, my recollection is it is provided for in the bond indenture or supplement of the bond indenture.

Q. Dated 1904? A. I don't know the exact date of it.

Q. Prior to the lease to the New Haven, anyway? A. I don't recall that.

Q. It is shown? A. The record would show that.

443 Q. And as far as you know, that agreement is being carried out? A. Yes.

Q. Now, why did you credit the New Haven with only three-fourths of the interest paid on the bonds that were in the Sinking Fund from January 1, 1936, rather than with all of the interest? A. Since New Haven or the Connecticut Company was entitled to three-fourths.

Mr. Martin: Please talk louder.

A. (Continuing.) Since the New Haven Railroad or The Connecticut Company was entitled to only three-fourths of the Sinking Fund, any earning of the Sinking Fund—

444 they were entitled to only three-fourths of any earning of the Sinking Fund to that extent.

By Mr. Garfield:

Q. Then you gave the three-fourths instead of four-fourths, because you understood they were entitled to only three-fourths of the contents of the Sinking Fund; is that correct? A. That is correct.

Q. Now, will you look at your Exhibit X-1. You notice the second description of bonds in the left-hand side of that exhibit refers to 209,000 of Connecticut Light & Power 5's. Are you familiar with those bonds? A. I know of them, yes.

445

Q. Do you know the date of their maturity? A. I think it was January 1, 1939.

Q. They have already matured, in other words? A. According to the terms of the indenture, yes.

Q. And what happened to them at maturity? A. My understanding is that funds were provided to acquire them, but not for the Sinking Fund.

Q. They were paid off? Or were they refunded? A. No, they were bought by an agent for C. R. & L.

Q. Were they bought with the proceeds of C. R. & L. 4½'s issued to raise money for that purpose? A. No, they were not.

446

Q. Well then, the total bonded indebtedness for which C. R. & L. is now liable is 209,000 less than it was prior to the first of this year; is that right? A. As far as I know, the bonds are still alive. They have not been retired or cancelled.

Q. Is the interest still being paid on them? A. I can't tell you that, because there is no interest due subsequent to January 1, 1939.

Q. Now, isn't it true that as a part of the agreement under which the C. R. & L. 4½'s were issued and the supplemental agreement relating to the Sinking Fund, 209,000 of C. R. & L. 4½'s were reserved to refund those C. L. & P. bonds? A. Yes.

447

Q. And that when that refunding operation was carried out, the interest payable on the total bonded indebtedness of C. R. & L. would be reduced by the difference between 5% and 4½% on 209,000? A. That would have been the effect of the indenture if it was carried out.

Q. And if those provisions had been carried out there would have been 209,000 more of C. R. & L. 4½'s outstanding afterward. Would there not? A. Yes.

Q. And the ½% principal payment into the Sinking Fund annually would have been increased proportionately? A. That is correct.

448 *Carl H. Zipf—For Petitioner—Cross.*

Q. Your figures in X-1, however, do not reflect any such refunding operation. A. That is correct, yes.

Q. Now, when the bonds of C. R. & L. are finally retired, the rent under the old 1906 lease would have been substantially reduced, would it not?

Mr. Martin: I object to that question. That is not the case. That would be only the case in case the New Haven Railroad carried out its part of the contract.

449 Mr. Garfield: I didn't ask you. I asked the witness.

Mr. Martin: You are asking the witness for a legal conclusion and he is not qualified to answer that question.

Hincks, J.: I think it is a conclusion.

Mr. Garfield: I would like to read part of a paragraph from the Supreme Court decision. The New Haven also paid $1,049,562.50 annually for the street railways.

That is the figure that appears in Exhibit X-1. Continuing, Justice Reed: "Of this amount, $504,975
450 was intended to provide for the payment of interest on the Connecticut Railway's bonds and for payments into a sinking fund. These interest and sinking funds payments created a claim upon the lessor for the contents of the fund at the date of payment of the bonds. The arrangement looked to the cancellation of the bonds in 1951 by the New Haven's payments, and the issuance by the Connecticut Railway of new bonds in their place. The delivery to it of these bonds, the New Haven agreed, would liquidate its claim for the contents of the Sinking Fund. In effect the annual reserve rent would then be considerably decreased, for the interest and sinking

451

fund payments would be for its benefit as owner of the new bonds."

That is taken from the Supreme Court's decision, the reference to the reprint of the decision in the record in this proceeding being pages 5196-5197.

By Mr. Garfield:

Q. Mr. Zipf, will you subtract these two figures for me? Start with $1,049,563.50, and subtract from it $504,975. What do you get? A. $544,588.50.

452

Mr. Garfield: Now, that is the amount, if your Honor please, which the opinion of the Supreme Court states by this mathematical calculation was payable for rent other than to provide for payment of interest on C. R. & L.'s bonds and payment into the sinking fund; and the lease expressly states that as soon as the bonds have been paid off, the portion of the rent which represents payments of bond interest and sinking fund payments, will no longer be chargeable.

By Mr. Garfield:

453

Q. Mr. Zipf, have you ever computed when the outstanding bonds will all be retired by the operation of the Sinking Fund agreement? A. You mean the outstanding C. R. & L. bonds?

Q. Yes. A. No, I haven't.

Q. That is purely a mathematical calculation, if you know the number of bonds now in the Sinking Fund, the interest rate, and provisions of the Sinking Fund agreement, is it not? A. Why, I know that the provision for the

454 *Carl H. Zipf—For Petitioner—Cross.*

retirement of bonds through the operation of the Sinking Fund would not retire all the outstanding bonds by the date of maturity of the bonds.

Q. Do you remember how many would be left at that time? A. I don't recall offhand, no.

Q. Did you have anything to do with the preparation of the proof of claim of the C. R. & L. in this proceeding? A. No.

455 Mr. Garfield: Mr. Martin, I will ask you whether in that proof of claim you did not show a figure of $3,116,000 as the amount of bonds which would remain outstanding at maturity, if the Sinking Fund provisions were carried out?

Mr. Martin: Well, it is stated in here, "the obligation to pay the principal at maturity of certain of the Claimant's First and Refunding Mortgage Bonds which become due in 1951, at which time said bonds will be outstanding and matured in the sum of $3,116,000. After the prior redemption of the same by the application of Sinking Fund payments to that date * * *."

456

By Mr. Garfield:

Q. Now, Mr. Zipf, if 3,116,000 bonds were outstanding at that time, do you know how many bonds would then be in the Sinking Fund?

Mr. Martin: I object to that question. I do not know how many would be in the Sinking Fund. It depends on how many had been bought and put in the Sinking Fund.

457

Mr. Garfield: I said if this many were outstanding, how many would be in the sinking fund. It is a pure question of mathematics.

Mr. Martin: How do we know where others are going to be?

By Mr. Garfield:

Q. Do you know the total outstanding bonds unpaid? A. I do not know offhand, no. I would have to——

458

Q. (Mr. Garfield hands book to the Witness.) The report of the Public Utilities Commission dated 1938, at Page 38, contains this statement, "$8,269,000 being Connecticut Railway and Lighting First and Refunding Mortgage 4½% Bonds." That refers to the bonds outstanding at that time, does it not? A. That is, as I understand the remainder of the statement. It speaks of the unmatured funded debt, amounts to $14,332,354, of which $4,998,000 is held in the Sinking Fund, making the funded indebtedness actually outstanding $9,344,254, $8,269,000 being Connecticut Railway & Lighting Company's First and Refunding Mortgage 4½% Bonds, 209,000 Connecticut Light & Power Company First Mortgage 5% Bonds, and $866,254 Equipment Obligations issued in 1936 and 1937 for the purchase of new motor busses.

459

Q. Now, from those figures you could compute the total bonded indebtedness, could you not? A. What do you mean by "the total bonded indebtedness"? Outstanding in the hands of the public, or——

Q. Either the total bonded indebtedness outstanding in the hands of the public, or the total outstanding including the Sinking Fund. It could be figured from those? A. Yes.

Q. Computed from those figures.

460 *Carl H. Zipf—For Petitioner—Cross.*

Now, if it is true as stated in your proof of claim that $3,116,000 of bonds will be outstanding in 1951, and if that would leave in the Sinking Fund at that time 10,348,000, it would be a simple mathematical computation to determine how soon the interest on those bonds in the Sinking Fund would be sufficient to pay off the 3,116,000 outstanding, would it not? A. Well, that would be on the assumption that——

Q. I am asking whether it could be done mathematically. A. My understanding is that at the maturity of
461 a bond, some provision must be made for the refunding of the bond so that the operation of the Sinking Fund which pertained to it prior to that time would, perhaps, not be effective at that date of maturity.

Q. Very true. But if you wanted to figure the interest at 4½% on the bonds that were then in the Sinking Fund you could, as a mathematical proposition, very quickly determine how long it would take for that interest to equal the total amount of the bonds outstanding if you knew what that amount was? A. Assuming those bonds would still remain in the Sinking Fund.

Q. Yes. Now in your Exhibit X-1, you show the portion
462 of annual rentals payable on account of the transportation properties, three-fourths of Column 1, and the total figure is given as $1,049,563.50. And in the footnote you show that that figure was agreed upon by the parties to represent the annual rent payable by the New Haven in 1935. A. That is correct.

Q. You do not anywhere show on that exhibit that that rent will continue to be payable until the year 2905, do you? A. No.

Q. Do you intend to imply by this exhibit that such will be the case? A. That is my understanding of the lease, that there is a certain rental, $1,400,000, which will be payable at the termination of the lease.

463

Well, if you find yourself in disagreement with the Supreme Court on that, you would be willing to yield, I presume. A. Oh, yes.

Q. In your Exhibit X-2, in Column 3 you have assumed that for the entire period, or for all of the period shown in that exhibit, the annual rent would be $1,049.563.50, have you not? A. Yes.

Mr. Garfield: That is all.

Mr. Martin: Just wait a minute. May I say, in explanation of this, the Supreme Court says, 464
"We comment briefly on two other points raised. The Betterments and Sinking Funds having come into the possession of the lessors by the terms of the lease are not to be considered as offsets against the claim of the lessor. Their possession by the lessor increases the earning power of the assets to the benefit of the lessee."

Now, what the claimant has done here, which has not been very plainly explained, is this. There are certain betterments and contributions to the property in the form of real estate or improvements, or power plants, or tracks. Those presumably auto- 465
matically increase the net operating revenue. Those are automatic. Besides that, there were two other factors. The New Haven had not only contributed tracks and trolley cars to the property; they had contributed, over a period of years, a lot of money to the Sinking Fund. And three-fourths of the Sinking Fund, as shown in Exhibit 1, which is the stipulation, amounted, when the Petition was filed, to 3,369,750 par value of the bonds, and $125,755.96 in cash. It was customary after the beginning of each year to take the cash contributions and pay bonds with it. So that on December 31, 1935, there was

466 both bonds and cash. And immediately after the first of the year the cash was turned into bonds. They represented three-fourths of all the contributions which had been made to the Sinking Fund. And the position of the claimant is that the New Haven should now have the benefit of those contributions by having a credit for the interest that those Sinking Fund bonds earn. And that interest amounts to $157,000 each year. And that we are giving them credit for. We are also giving them
467 credit for $49,000 each year for an amortization contribution. Of course, they are not making that amortization contribution any more, but the rent of 1,049,000 originally contemplated that it was to contain this amortization amount. And then in 1951, if they performed their obligation to refund the bonds, they could recoup those contributions to the amortization fund.

So we have, as I suggest, most fairly and reasonably given the New Haven the benefit, first, of the interest from the bonds which were bought with their money; and second, the credit for the annual
468 amortization instalment which they were supposed to pay, but which, if the whole lease had not been rejected, they would have had a chance to recoup in 1951. I think it was, perhaps, generous of us to give that second item. But we did it, anyway. I mean it was a controversial point that there could have been some argument about. The suggestion that the Supreme Court's opinion can be construed to mean that the actual rent is to be less, is unjustifiable, and it is taken care of by our increase in our annual rental value which we have undertaken to make here.

469

Hincks, J.: In any event, it is a matter of argument, is it not, from the basic facts in the record?

Mr. Martin: Yes, it was a matter of record, and this line of questioning was directed to something which I thought was irrelevant.

By Mr. Martin:

Q. Will you please look at X-4, which I will give you, and tell me whether Exhibit X-4 reflects any payment of income taxes for the year 1938? A. There is a provision for payment of $24,013.30 income tax at 16½% on $145,535.13 of net income after adjustment and before Federal income taxes.

470

Q. Have you audited the company's books for that year? A. Yes.

Q. Do you know whether that is the income tax on the net operating revenue? A. That is the income tax applicable to the revenue from operations of the transportation property.

Mr. Martin: All right.

471

By Mr. Garfield:

Q. After deduction of all deductible items? A. The amount which will actually be paid is considerably more than that.

Q. But the transportation properties' proportion of the amount? A. If the amount which will be paid is allocated on the basis of the provisions of the lease agreement, the amount which C. R. & L. would pay would be more than twice that, that the Connecticut Company would pay.

472 *Carl H. Zipf—For Petitioner—Cross.*

Mr. Garfield: I object to that. I think he is allocating on his understanding of the lease agreement. We will have to have some further proof on that.

Hincks, J.: We will have to take a recess until 2:30.

(At 1:37 P. M., a recess was taken until 2:30 P. M.)

---

473 MARCH 15, 1939, AFTERNOON SESSION.

Mr. Martin: Will your Honor take judicial notice of the fact that neither the Connecticut Company nor the New Haven Railroad, since the rejection of the lease, has paid any money into the C. R. & L. Sinking Fund? Of course, they have not.

Mr. Garfield: I will admit that.

Mr. Martin: That is because our position is that they shall have the full benefit of all the payments made up to the rejection of the lease which we understand the Supreme Court told us to give them. But
474 of course, although the lease says the bonds are to be refunded in 1951 and that after that the New Haven is to have the benefit of a reduction in interest and a corresponding reduction in the rental, our position is that they are not to have that any more, that they are only to have the benefit of the payments that they actually made into the Sinking Fund themselves, and that they are not to have the benefit of the bonds that the C. R. & L. redeems or buys out of its own money. Otherwise, they might just as well claim the benefit of the new buses that we buy with our own money, or something like that.

Walter Carr—For Petitioner—Direct.

475

WALTER CARR, called as a witness on behalf of Connecticut Railway and Lighting Company, being first duly sworn by Clerk Pickett, testified as follows:

By Clerk Pickett:

Q. You full name? A. Walter Carr.

Q. Walter Carr. Where do you live? A. Fairfield, Connecticut.

476

Direct examination by Mr. Martin:

Q. Mr. Carr, you are a Vice-President of Connecticut Railway & Lighting Company? A. Yes.

Q. And you are a resident of Bridgeport? A. Office in Bridgeport, live in Fairfield.

Q. And that is where your office is? A. Yes.

Q. And you have charge of the management of the property? A. Yes.

Q. When Mr. Zipf was on the stand, he testified that in 1937, for the purposes of Federal income taxes, a property loss was taken in the sum of $2,826,822. Do you 477
know what that property loss consisted of? A. It was the abandonment of the C. R. & L. property.

Q. The railway properties that you took over from The Connecticut Company? A. Yes.

Q. And is that a recurrent loss? A. No.

Q. A recurrent item, I should say. A. No.

Q. As far as you know, it will never recur again? A. As far as I know.

Hincks, J.: You mean by that the property that is abandoned once will never be abandoned again.

478 Mr. Martin: I mean I am explaining the lack of income for that year, and the fact that we paid no income tax was because we then abandoned these trolley properties which had the value, and that that will not happen again. Now, of course, it may be that there is a cycle of trolley properties, and there may be another cycle for bus properties. For instance, it is suggested that the bus property cycle will be the same as the trolley property cycle, and the trolley property cycle lasted about forty years, but as far as we can say, it will not occur again.

479 That is all.

Cross-examination by Mr. Garfield:

Q. Mr. Carr, can you tell me what the figure for investment in road and equipment which now appears on the C. R. & L. books is? A. I don't recall the figure.

Q. Well, I show you the 27th Annual Report of the Public Utilities Commission of the State of Connecticut, page 38. A. That covers the year 1937.

Q. Yes. And ask you whether it does not there state
480 that the investment in road and equipment, as at the close of the year, amounted to $31,119,228.56. Is that what it says there? That question can be answered very easily, Mr. Carr. Does it or does it not say that? A. I had probably better read the entire paragraph.

Q. All Right. A. (Pause) "Therefore the investment in road and equipment, as at the close of the year, amounting to $31,119,228.56, includes street railway properties now abandoned and does not include additions or retirements made by the former lessees, the amount carried at November 16, 1936, the date the transportation property was turned over, being approximately the same as at

August 1, 1906, when all property was leased for a term of 999 years."

Mr. Martin: I do not think he has answered the question yes or no.

Mr. Garfield: He has read from the report, reading the words I read, so I am satisfied.

By Mr. Garfield:

Q. That is from a report of the Public Utilities Commission, commenting on the Connecticut Railway and Lighting Company property for the year there stated, is it not? A. It appears in the 1938 report of the Public Utilities Commission.

Q. And it refers to the Connecticut Railway & Lighting Company? A. It is headed, "Connecticut Railway & Lighting Company."

Mr. Garfield: Yes. That is all.

Mr. Martin: Mr. Leete, will you take the stand, please?

PERCY R. LEETE, called as a witness on behalf of Connecticut Railway and Lighting Company, being first duly sworn by Clerk Pickett, testified as follows:

By Clerk Pickett:

Q. Your full name? A. Percy R. Leete, New Haven.

484 *Percy R. Leete—For Petitioner—Direct.*

Mr. Martin: I ask that this document be marked for identification. These are your figures.

(Exhibit X-12 for identification: Statement of Estimated Operating Income of The Connecticut Railway & Lighting Company Property—Years 1925-1935 Inclusive.)

Mr. Martin: Those are the figures that they gave me. (Hands paper to the witness.)

Direct examination by Mr. Martin:

485 Q. Mr. Leete, you are Assistant to the Comptroller of the New Haven Railroad? A. I am. I am Assistant with the title of "Valuation Engineer," yes, sir.

Q. Have you a position with The Connecticut Company, also? A. I think I could say "yes" to that.

Q. And these figues that I have handed to you, do you recognize them as the ones that Mr. Wells and Mr. Garfield gave me the day before yesterday? A. Yes, sir.

Q. Did you have anything to do with getting them up? A. The statement was prepared for my use by the Department of Statistics.

Q. Now, in connection with the fourth column, entitled
486 "C. R. & L. Co. Operating Expenses," can you tell me the depreciation that was charged off to income before this figure in 1935, before that figure of $2,198,160 was arrived at? A. I doubt if I have that figure with me, Mr. Martin.

Q. You can't tell me that depreciation figure for any of those years? A. I might have it for one year.

Q. Do you think you could tell it if I showed you a Public Utilities Commission report? I will show you one and we will see. A. No. The answer to that is "No."

Q. You couldn't tell? A. No, sir.

Q. I will ask you, then, please to look at your records and see, because what I want to find out from you now is

487

what the items of depreciation were which were charged off when these operating expenses were calculated. A. Before I look, may I just explain?

Q. Certainly. A. That these figures for the years 1935 to 1930 were based on what, perhaps for brevity, I might call a formula for segregating as between the Connecticut Company and the Connecticut Railway & Lighting Company the System operations of the Connecticut Company, which method of segregation was explained to the C. R. & L. accountants at the time. And they were quite conversant with that.

488

For the years from 1929 back, including that year, the same meticulous nicety was not possible at the time, and those figures were based upon the portfolio statements or income statements of The Connecticut Company which were maintained by the Operating Division. But I would express it as my opinion that they do furnish a very reasonably accurate segregation of those income separations.

The particular depreciation that is in there for any one year is a matter of the underlying detail. It is that depreciation which applies to the particular property of the C. R. & L., notably all of the equipment, busses and trolley cars, and the depreciation which was actually charged to operating expenses for the Seaview Avenue Power Plant, and I think the Stratford substation and the equipment.

489

Q. Mr. Leete, what does "net operating revenue" mean? A. Net operating revenue?

Q. Yes, sir. A. By "net operating revenue," I would understand the same term as "net revenue" that I have used on here, namely, the operating——

Q. (Interrupting) I show you Exhibit X-11, which was also given to me by counsel for the New Haven. And it has a column marked, "Net Operating Revenue." That

490 indicates some ratio between income and outgo, doesn't it? A. Yes. I believe that column heading means the same thing as this column headed "Net Revenue."

Q. Well, obviously, it does not mean quite the same thing in the two exhibits, because in one case it is figures and in another case it is a fraction, isn't it? A. I was merely talking about the column heading.

Q. Right. In Exhibit X-11, the column heading indicates a ratio between the income and outgo; is that correct? A. It indicates the ratio of the Connecticut Railway & Lighting Company net operating revenues to the net 491 operating revenue of The Connecticut Company System. Do I make myself plain?

Q. Oh, you mean it represents the fraction of the Connecticut Company's total revenue which the C. R. & L.'s income bears to it. A. That is right. It was just a proportion between the C. R. & L. portion of the System and the entire System, including the C. R. & L.

Q. I see. I didn't understand that. Now, can I trouble you to get such records as you have that will enable you to explain the depreciation deductions?

492 (Witness leaves the stand; then returns.)

A. Mr. Martin, I am somewhat disconcerted in not having just what you want here.

Q. What have you got for the year 1925? Have you got something for the year 1925 that will show what was charged off to income before the C. R. & L. net revenue, charged off to depreciation? A. Unfortunately, I only have here the System charge-off, and I haven't the figure here that shows the separation between the C. R. & L. and The Connecticut Company. I have the principle under which it was done.

Q. Well, perhaps you can explain that to us, if you will, please. A. Well, there was no difficulty about deter-

493

mining that, because we worked directly from the equipment that was assigned to the C. R. & L. Operating Divisions; that is, corresponding to the equipment that was turned back to the C. R. & L., or that that was on their divisions, together with the equipment on such of the fixed property as was depreciated, which, as I have already stated, would be the depreciation on the power plant substation and equipment.

Q. Well, I show you the report of the Public Utilities Commission of Connecticut, dated 1926, which I believe would cover the year 1925, would it not? A. I assume so.

494

Q. And I show you the New Haven Railroad's financial report with regard to the Connecticut Company. And on Page 468, I invite your attention to an item entitled, "Loss on Road and Equipment Retired, $197,707.16." Can you you tell me what that represents? A. Well, I assume that that represents the difference between the ledger value at which this road and equipment was carried in the investment account, and the amount at which it was disposed of, after charging off against the depreciation reserve any depreciation that had been accrued on those particular items of property. In other words, this is a profit and loss item, and might or might not have any relation to your depreciation.

495

Q. Well, this was a financial statement that included both the properties of The Connecticut Company and of the C. R. & L., I think. A. I assume that must be the fact. It was for that year, yes, sir. I will agree with that. I will take your word for that.

Q. Well, I suppose that is true. A. (Pause) Yes, sir, that is true.

Q. And in this consolidated item of $197,000, is there contained both the C. R. & L. properties and the Connecti-

496 cut Company's own properties? A. There might well be both properties in that; yes, sir.

Q. Well, the answer really is "yes," isn't it, Mr. Leete, because if it is "no," then I am going to ask you where the separation comes? A. Well, I will make my answer this way, that if there was any loss on road and equipment items of C. R. & L. property included in the financial statement for this particular year, then those losses would be included in this figure here.

Of course, without knowing what the property was,
497 I would not know whether there are or not.

Q. Right. Now, what kind of losses did you say were represented by that item? A. Well, suppose we sold a building which had stood in our accounts at, say $50,000, and we sold it for $10,000 and had not accrued any depreciation on that building. There would then be a profit and loss charge here, $40,000.

Q. "Profit and loss charge" is another way of saying "Charge to Surplus." Isn't it? Am I right about that? A. Yes, it goes into surplus directly.

Q. And so, being directly against surplus, it would not be reflected in the income account, would it? A.
498 No, sir.

Q. So that if there was a building belonging to C. R. & L. which you sold at a loss in 1925, the loss would not be reflected in the estimation of the C. R. & L. income because it had been charged against the surplus of The Connecticut Company; isn't that so? A. Provided the building was replaced, that is so, yes.

Q. Well, anyway, for income purposes the loss is never reflected in income, is it? A. Yes, sir, if the property is replaced. Suppose there was that same building at $50,000, and I replaced it with another building costing $75,000.

I would have a $50,000 retirement item in my expenses. That would be in my income account.

Q. Wouldn't you buy the new building out of your surplus? A. Well, that would make no difference how I derived the funds for the new building, whether I borrowed the money or issued bonds and sold stock, or had enough surplus to build the new building, the accounting as between the income account and profit and loss account would depend entirely upon whether this building was retired and replaced, or whether it was retired and not replaced.

Q. If the $197,000 is a consolidated item and it represents the kind of operations which you have just described, it is evident that if the loss occurred in the sale of C. R. & L. property it would not be reflected in any way in the C. R. & L. income account for that year. A. No, not if it was an abandonment.

Q. Now, I invite your attention to Page 475, which is Schedule L, entitled "Depreciation, Road and Equipment." A. Yes, sir.

Q. Is there anything in that schedule from which you can tell whether the depreciation is taken on Connecticut Company-owned property or C. R. & L. property? A. Not to distinguish between the two.

Q. Can you tell on looking at that schedule what property the depreciation charges cover? A. I can tell you the nature of the property?

Q. Well, look at it hard and see if you can tell me. Isn't there a list of the property there, of the kind of property? A. Well, you can pick that right out here, Mr. Martin.

Q. What is that? A. The passenger and combination cars, freight, express and mail cars, service equipment, electric equipment of cars.

Q. That is right. A. And locomotives, and floating equipment, though I doubt if they have any floating equip-

502 ment; and motor busses, automobiles, and power plant equipment.

Q. Let's see. Cars, cars, cars, service cars and power-plant equipment. A. Power plant equipment.

Q. What does the "Service Equipment" mean, this item? A. The Service Equipment is not revenue equipment, but work equipment like snow-plows.

Q. I see. Rolling stock. A. Yes, it is some kind of rolling stock. It might be either small trucks to carry men around——

503 Q. Yes; when you look at these items listed here, are they not divisible into two general divisions, Rolling Stock and Power-Plant equipment? A. They are, yes, sir.

Q. Well, that is all charged against income, isn't it? A. Yes, sir.

Q. And where in that schedule, or if there is another schedule, is the depreciation for things like deterioration in track and in trolley wire and in pavements where the company had to do repaving? A. Nowhere, because depreciation on items of that character has not been charged.

Q. Well, why not? A. It has been the practice of the Street Railway Company, as it is common practice with the

504 steam railroad, not to charge off depreciation on roadway property except certain selected items, and it was not a requirement of the accounting classifications of the Commission.

Q. Is it now a requirement? A. Not under the street railway classification, under which the Connecticut Company is still operating. It is not a requirement.

Q. Can you tell us how much annually would be required properly to depreciate those items that I have told you, consisting of tracks, trolley wire and pavement? A. You mean on the C. R. & L.?

Q. Yes. A. Well, I should say none, because you have written it all off.

505

Q. Oh, no, I mean in 1925. A. In 1925.

Q. Or any year that you select when they had this property, as long as you state the year. A. Well, of course, that is pretty much a matter of personal opinion and policy.

Q. Well, I value your opinion. A. Well, if I knew your policy I could express my opinion better.

Q. Very good. I will tell you my policy. It is to write off each year the reasonable value of the depreciation in those three items which occurs that year, so that instead of having to replace an enormous amount of track in one year, perhaps, I will have a fund that is slowly growing, perhaps, which has been charged to income, and when the time comes I will have the money at hand. Is that an intelligible policy? A. Oh, yes, that is an intelligible policy.

506

Q. Then I solicit your opinion as to what the probable annual depreciation charge would be on that. A. I will go at it in this way, Mr. Martin. I would first have to know how much real estate you had which you wouldn't depreciate. And then, of course, next I would have to subtract all——.

Q. Excuse me, Mr. Leete. Why do you have to know about the real estate? I have not put that in as one of the items. A. Oh, I beg your pardon. You are confining it purely to these other items.

507

Q. To track, trolley wire and pavements. A. I think, then, following your policy, I would adopt your statement this morning that these properties, trolley operation, lasted about forty years. And that would give me a straight-line depreciation, say, of 2½% on that theory. Of course, if——

Q. (Interrupting) What I meant by the trolley cycle was not that the property lasted forty years, but that the particular mode of transportation might be expected, in a fairly constant society, to last in that form for forty years.

A. Well, then——

508 Q. (Interrupting) What I want to get from you, if I can, and it may not be possible, is a statement in dollars of how much, assuming my policy, ought to have been laid aside each year, out of income, to depreciate these three items; because it is perfectly evident it has never been done. A. Mr. Martin, I am not trying to fence with you, but it is very difficult for this reason, that under ordinary circumstances you would be replacing a great many items of that kind of property. For example, your trolley wire would last long, but some of your overhead stuff, your clips, and wire that
509 might be galvanized iron wire, and things like that which you are constantly renewing from year to year, you wouldn't—that is, you are asking my opinion—I wouldn't accrue any depreciation on items of that sort.

Q. Yes, but you are changing my policy now, Mr. Leete, aren't you? You are saying if you were I, you wouldn't do it. But I insist on doing it. And then I want to know whether, by the figures which you have, or by a ratio which you may have, you could tell how much that would come to.

Mr. Garfield: If your Honor please, I do not see
510 how we are being helped any by Mr. Martin suggesting a policy which he claims is his policy, but which is not the policy of the Public Utilities Commission or the Interstate Commerce Commission, and asking Mr. Leete what would be depreciation if that policy were pursued. The policy which is actually pursued is that which is required by the regulatory bodies in which maintenance takes care of depreciation of these roadway items, and therefore no depreciation is actually accrued. I think we are wasting time in discussing what depreciation would be accrued if Mr. Martin's policy were followed, when the regulatory bodies do not require that.

511

Mr Martin: I do not think the Public Utilities Commission or its rules will determine what the operating income from my property amounts to. It may determine how I have to spend it, but it does not determine the amount of it.

Hincks, J.: Might it not affect the amount of it if you have to operate in accordance with their regulations?

Mr. Martin: That is what I would like. I would like to know that. We have here an eleven-year span from 1925 to 1935, in which the only depreciation 512
that has been charged is for power plants and rolling stock. That is contrary, anyway, to the usage of some people. I wish to demonstrate that, when they say that our net revenue amounts to a certain amount, that they have not charged against that net revenue a depreciation charge which ought to have gone in.

Hincks, J.: Ought to have gone in consistently with operation authorized and required by the regulatory bodies?

Mr. Martin: Yes, with operation, yes. They require us, for instance, to keep the pavements in 513
good order, and pavements have a certain life. Now, the Public Utilities Commission is not going to tell us how to set up a depreciation charge. What they are going to require is a certain service, and the certain service requires a safe trolley wire and good pavement and safe tracks.

Hincks, J.: I may be mistaken. I thought the Public Utilities Commission was vitally interested in proper bookkeeping for this class of property.

Mr. Martin: Well, I have no doubt they are, sir. I did not mean to suggest they were not interested in bookkeeping. What I mean to say is that their

514 requirements, whether requirements of operation or requirements of bookkeeping, are not requirements which can determine how much my net income is. That is my business.

Mr. Garfield: If the property is maintained according to the safety standards which the Public Utilities Commission requires, and there is no suggestion that it was not, and if the Public Utilities Commission feel that that policy of maintaining the property in safe condition makes it unnecessary to set up an additional depreciation reserve, and if we 515 have followed their requirements, as there is no suggestion that we have not, I do not see how Mr. Martin thinks that his net earnings have been wrongly stated when we have done the thing exactly as the regulatory body required that we do it.

Mr. Martin: Well, I remind the Court that I offered evidence in 1937, showing that the condition of the property was at least two and one-half million dollars below what it ought to have been. And it certainly is not justifiable to assume, as Mr. Garfield perhaps has suggested, that it was in good 516 order when it was returned to us. It had not been kept up properly for a number——

Mr. Garfield (interrupting): Just a moment. The Court did not accept that, Mr. Martin.

Hincks, J.: I am unable to perceive the precise destination for which Mr. Martin is headed, but I do not feel disposed to curtail him. I think he ought to have a right to bring out such evidence as he can reach, and what the result would be, I do not know until it is all in. So that if there is an objection, I will overrule it.

517

By Mr. Martin:

Q. Have you any figures or ratio fractions which would enable you to answer the question, "How much would it have been proper to set aside for depreciation of pavements, tracks, and trolley wires belonging to C. R. & L. each year?" I think I should make that more specific by saying, "in any year, preferably in 1925." A. No, I haven't, Mr. Martin. I will answer, the only study I have ever made on rail, for example, was limited to the New Haven, that is, the steam railroad, and I do not know as it would be so very much different for the street railway, except probably the street railway's rail cycle might be longer because of the nature of the traffic and the fact that you are not disturbing the paving so frequently. And I am just telling you from memory that the percent of depreciation that I estimated at that time on railroad rail was something like 1.7% per annum.

518

That figure was never used. It was just an abstraction that I had to get into. No, I can tell you this, and referring specifically to the C. R. & L., on the Sea View Power Plant, which is one of the items of property such as you named, we have charged depreciation of 2% per annum.

519

Q. On the what? A. The Sea View Avenue Power Plant.

Q. Oh, yes. A. In Bridgeport. We charged depreciation at the rate of 2% per annum, and on the equipment at the rate of 5% per annum.

Q. That does not help me with my items, does it? A. If I understand you right, you are giving me back items which the P. U. C. reports showed you charged depreciation on. What I want is the items which you didn't set up any depreciation for. A. Well, of course, on that I can't help you very much.

520 Q. Can you tell me, looking again at the Exhibit X-12 which I handed to you, how the depreciation which was charged off was arrived at in order to ascertain what was the C. R. & L.'s share of it? A. In other words, approximately what was the depreciation in these figures?

Q. Yes, or what proportion of the consolidated operating revenues. Tell me in some way so that I will understand it. A. Well, I have these figures here, that from 1927, from December 1927 to May 31, 1934, there was a charge to expenses for depreciation of $1,919 on your Sea
521 View Avenue Power Plant.

Q. Is that a C. R. & L. property? A. Yes. And $45,390 on the Power Plant equipment. On the Congress Street Sub-station, the annual charge, which was discontinued in November, 1936——

Q. May I interrupt you, Mr. Leete? I see that your system is not to allocate a proportion of the total depreciation charge to C. R. & L. properties, but to take the specific properties themselves. A. It would be the exact depreciation that was charged.

Q. That is done throughout? A. Yes.

Q. There were no C. R. & L. properties that you took
522 a relative value for to find out what the proportionate charge-off was? A. No. We took the absolute item of the property.

Hincks, J.: I understood that Mr. Leete said that he took the absolute values for the period up to and including 1929, and used a formula for the subsequent period.

The Witness: Well, as to depreciation, your Honor, the values are absolute for all these years.

Hincks, J.: Very well.

The Witness: Now, the Congress Street Sub-station——

By Mr. Martin:

Q. Excuse me. I do not want any more of those details unless you want to tell me something that you think I ought to know. A. I am only trying to tell you what I thought you wanted to know. I don't know whether you ought to know it or not.

Q. Yes. A. On that building there was $715 a year and $8,922 on equipment. I think this gives you some idea of some extent of the depreciation in there. Stratford Sub-station $300 a year on the building and $4,354 on the equipment.

Q. Well, I assume that you took proper and full depreciation on rolling stock and power plants, because it says so in the P. U. C. reports. A. That is right.

Q. And I am now satisfied that the way you did that was to do it with the actual figure and not with the application of a ratio. A. That is right.

Q. On the other hand, you have suggested that up to and including 1929, the division of income between the two companies was on the basis of some ratio; is that right? A. That is true.

Q. And what was that ratio? A. No——

Hincks, J. (interrupting): Up to '29, I understood him to say on the actual figures, that the ratio was used for a subsequent payment.

By Mr. Martin:

Q. Which was it, Mr. Leete? I understood it just the opposite. A. Well, now, perhaps I have gotten myself confused. Referring once more to exhibit——

Q. X-12. A. X-12—I have the same difficulty that his Honor has. The figures of C. R. & L. operating revenues

and C. R. & L. expenses and net revenue, and C. R. & L. operating income, yes, and taxes, were figured on what I have called this formula.

Q. For what years? A. For the years 1930 to 1935.

Q. Oh, yes. A. For the year beginning 1929, and going back to 1925——

Q. (Interrupting) Won't you tell us about the formula before you leave the years that the formula attached to? A. Yes. That was one I just briefly described as one which we had submitted to the C. R. & L. accountants.

527 Q. But you didn't tell me what it was. I have no idea what it was. A. I think I had better get my memorandum on that. (Witness leaves the stand; then returns.)

Mr. Garfield: Would it shorten this to say, your Honor, that this was the formula which was submitted to the C. R. & L. accountants and which your Honor approved in making the settlements between the companies? I do not know whether that will satisfy Mr. Martin or not, but that is the case.

Mr. Martin: If I had known of this formula, I would not have bothered with Mr. Garfield's 30 and

528 33% formula that he had. I want to know now what it is. I haven't the slightest idea what it is.

By Mr. Martin:

Q. I have hopes that you are going to tell me a single figure which will be a fraction. A. Well, you remember I said I might call it a formula for brevity's sake.

Q. I want to know on what basis you allocated the net income to C. R. & L. during the years 1930, 31, 32, 33, 34, and 35. A. Yes, sir. The Norwalk, Bridgeport, Derby, Waterbury and former New Britain divisions were practic-

529

ally all 100% C. R. & L. property, with the exception of a small part of a motor-coach route running out of the Waterbury division and going to Hotchkissville. Now, the records were such—they were kept on a division basis—that we could take the revenues that were accredited to those divisions that I have named, and say definitely that they were revenues which should be considered as arising from C. R. & L. territory.

On that short motor-coach route which I mentioned between Waterbury and Hotchkissville or Middlebury, it was the opinion of our operating department in Waterbury 530
at the time that about 30% of that revenue came from the Woodbury route and 60%—and that 30% of that route, of the Woodbury route, and 55% of the Middlebury route, were applicable to the Connecticut Railway & Lighting Company, so that that was the way we treated that. In the case of the New Britain division, the passenger revenues were allocated directly, while miscellaneous revenues were allocated on the basis of directly-assigned passenger revenue.

Q. And, Mr. Leete, when you got all through allocating some revenues to The Connecticut Company and some 531
revenues to the C. R. & L., what was the relative proportion? One had so much and the other so much. A. That is on one of these exhibits, that one you showed me with the percentage figure.

Q. Oh, that is where those figures came from? A. Yes, sir. We had to get the figures first to get the percentages.

Q. Oh, those are the figures on X-11? A. That is right. Those figures on X-11——

Q. I see. A. (Continuing)—back through 1930, were based on this sort of an explanation I have just given you.

Q. Where did the figures for 1929, 28, 27, 26 and 25 come from, then? A. On those, instead of working from

this basis, we worked directly from the income account, which was subdivided by divisions. In other words, we took the Norwalk, Bridgeport, Derby, Waterbury and New Britain divisions, and considered those as 100% C. R. & L.

Q. I see. A. In later years, we were able to refine it quite a little.

Q. Now, to go back to the Public Utilities Commission report, the item of $197,000 occurring on page 468, being the loss on road and equipment retired, that was charged to surplus, was it not? A. Yes. It was charged to profit
533 and loss, which is a subdivision of surplus.

Q. Do you know how much that item of loss on road and equipment retired charged to surplus amounted to from 1925 on? A. No, sir. I don't. It is shown in all those annual reports.

Q. Well, I show you some figures on a yellow piece of paper. You see, here is 1925. There is $197,707. A. Yes.

Q. If you looked at those, could you tell me whether those were the charges made under this item in other years, or shall we have to get the reports out? I mean if you can't do it, don't do it. Do you think that that looks familiar? A. Well, it doesn't look familiar. I haven't
534 any reason to challenge the computation.

Mr. Garfield: I object to that.

Mr. Martin: Do you want me to get the reports out, or do you want to admit these figures are right?

Mr. Garfield: I do not know anything about them. I can't admit them.

Mr. Martin: Get all the reports out.

Mr. Garfield: If you put on a witness to say they are right, that is a very short way to do it, but I cannot admit them.

535

By Mr. Martin:

Q. Mr. Leete, you can't tell whether these figures are correct or not, by looking at them? A. No, sir; I can't.

Mr. Martin: Let us get all the reports, the whole bunch, out.

Mr. Garfield: Why not put on the man that made that piece of paper, to say that he got it from the reports?

This could be done at recess, if your Honor please. It does not have to be done right now.

536

Mr. Martin: It will not take more than a minute or two.

Hincks, J.: The testimony of this witness does not add anything to what the reports may say.

Mr. Martin: I do not want to put the reports in, do I?

Hincks, J.: I do not see why you should not read in what you want to, subject to objection, which I do not anticipate.

Mr. Martin: I will do that, if I may. I read into the record from the reports of the Public Utilities Commission of Connecticut, from the report made by the New Haven Railroad with regard to its street railway properties, an item under a heading called, "Profit and Loss Account, Loss on Road and Equipment Retired," and in the 1926 report the item is $197,707.16.

537

Hincks, J.: What page, please?

Mr. Martin: On page 468.

Mr. Garfield: Is that for the C. R. & L. property, Mr. Martin?

Mr. Martin: He has testified it was for the consolidated whole property.

538 Mr. Garfield: He has said he didn't know whether the whole of it or how much of it was C. R. & L.

Mr. Martin: No, he says it was consolidated property. When they performed this operation, this is what they did, no matter who owned the property.

Mr. Garfield: That is all you are trying to show by reading these figures?

Mr. Martin: That is all. In the 1927 report on
539 Page 353, this same item, listed the same way is $219,183.58.

In the 1928 report on Page 348, this same item, listed in the same way, amounts to $528,039.19.

In the 1929 report this same item, listed the same way, on Page 348 appears as $650,504.65.

In the 1930 report this same item, listed in the same way, appears on Page 350 as $1,404,550.91.

In the 1931 report on Page 364, this same item appears the same way as $2,010,738.69.

In the 1932 report, on Page 326 this same item, listed the same way, appears as $2,426,106.22.

540 In the 1933 report on Page 307, the same item, listed the same way, appears as $1,560,970.06.

In the 1934 report the same item, listed the same way, on Page 313 appears as $420,135.82.

In the 1935 report the same item, listed the same way, appears on Page 315 as $1,408,645.20.

(Pause) Well, I didn't ask him for this. They didn't give us these. Is that '25 to '35, inclusive?

Mr. Fenlon: Yes. You didn't take '35.

Mr. Martin: Oh, '35 is in the '36 report, isn't it? (Pause.)

In the 1936 report, the same item, listed the same way on Page 315, is listed in the amount, $1,553,290.

Mr. Garfield: Mr. Martin, in every case, those figures that you have read are the entire Connecticut Company System figures, are they not?

Mr. Martin: Yes, I believe so.

Mr. Garfield: And there is nothing to show what part, if any, applies to the C. R. & L.?

Mr. Martin: No.

Mr. Garfield: I move all of those figures be stricken from the record, your Honor.

Mr. Martin: Let me finish examining the witness a minute, and then you can knock them out.

By Mr. Martin:

Q. These items, I state, subject to anyone else adding them up, come to more than $12,000,000; and according to these reports, the loss on road and equipment retired during this eleven-year period, if I am right in the addition, comes to more than $12,000,000, and no part of this $12,000,000 was ever reflected in any way in the C. R. & L. income, although its property also was included in the property listed under "Loss on Road and Equipment Retired." Is that so? A. I think that is probably correct.

Mr. Garfield: Did you mean to say, Mr. Leete, that its property *is* included in that item? Do you know that its property is included in that item?

The Witness: Perhaps I had better have the question repeated to me.

Hincks, J.: Read the question.

(The reporter read as follows:)

"Q. These items, I state, subject to anyone else adding them up, come to more than $12,000,000; and according to these reports, the loss on road and equipment retired during this eleven-year period,

544 if I am right in the addition, comes to more than $12,000,000, and no part of this $12,000,000 was ever reflected in any way in the C. R. & L. income, although its property also was included in the property listed under 'Loss on Road and Equipment Retired.' Is that so?"

A. If you will change that question to say "although these properties may have been," then I can answer yes. Or I will answer, "Yes, if any." I think either one will make it plain.

545

Mr. Garfield: I renew my motion to strike out.

Mr. Martin: He has already testified my property was in there.

Mr. Garfield: I renew my motion to strike out all of those figures, your Honor. The C. R. & L. property was not taken into the Connecticut Company books, as has been shown by the statement that Mr. Carr read into the record a few minutes ago, was not taken into the Connecticut Company books in 1906, and therefore could not have been retired out of those books. And there is no showing that any of these properties that were retired during that period were C. R. & L. properties, and therefore I move that they be stricken from the record.

546

Mr. Martin: Well, I can't tell what proportion of the $12,000,000 represents C. R. & L. properties retired. But we know perfectly well that some C. R. & L. properties were retired.

Hincks, J.: Mr. Garfield makes the point that, according to that statement that Mr. Carr wrote, the property had not been included in Connecticut Company capital account.

547

Mr. Martin: I do not understand what your Honor means, frankly. Has Mr. Carr made a statement?

Hinks, J.: Why, when he was asked a question by Mr. Garfield, he read a paragraph from the report of the Utility Commission which included the matter Mr. Garfield was after. I thought the substance of that was this: that after the C. R. & L. lease in 1906, two separate capital accounts were maintained, one of the leased property and one of the owned property, and that these reports cover only the owned property. Now, perhaps I am mistaken.

548

Mr. Martin: I will ask the witness. I would like to know, Mr. Leete, if there were two capital accounts set up. In 1906, your Honor, when the lease started?

By Hinks, J.:

Q. I think the question is, "After 1906, was the capital account of C. R. & L. property consolidated with the capital account of Connecticut property?" A. The answer to that is "No."

549

By Mr. Martin:

Q. You mean they were kept separate? A. Well, to clarify that so there won't be any doubt in anyone's mind, the book investment of the C. R. & L. property at the time of the lease in 1906 was not then, nor at any other time, put into the investment account of The Connecticut Company; but whenever the Connecticut Company made improvements on the property of the C. R. & L., which it did to the extent of $6,600,000, that went on The Connecticut Company's books.

550 Q. How do you mean it went on The Connecticut Company? I mean I just don't know what that means. A. I mean that was charged to The Connecticut Company's investment account.

Q. It was charged to the— A. To The Connecticut Company's investment account, in The Connecticut Company's account as a subdivision of its investment in road and equipment.

Q. So that when The Connecticut Company spent $6,000,000 on property, which, as soon as it was installed, belonged to the C. R. & L., that property was carried on
551 The Connecticut Company books as though it were The Connecticut Company property, and reports were made with regard to that property as though it were then Connecticut Company property? A. No, I wouldn't put it quite that way.

Q. I don't understand it then. A. The $6,600,000 which were built up over a period of years were shown in The Connecticut Company's accounts as Improvements on Leased Railway Property, and the balance at any time reflected what was the then investment of The Connecticut Company in improvements made at its own cost on
552 C. R. & L. territory which would go back to the C. R. & L. at that time, if the lease was terminated at that time.

Now, whenever there were any abandonments of C. R. & L. property, of the nature that you speak of in this twelve million that you have added up, they were undoubtedly credited on The Connecticut Company's books against this $6,600,000 of its own money.

Q. I think I see. When there was an abandonment of property owned by C. R. & L., it was reflected on The Connecticut Company's books by a reduction in the value of their leased property; is that right? A. That is, by writing down their investment there for leased line improvements.

553

Q. And it was not reflected in any way in the income account of C. R. & L. at all, was it? A. No, sir.

Q. It is quite plain that it isn't, Mr. Leete, because it is carried in the surplus account in all these reports, isn't it? A. Well, I am not telling you it was not in the income account.

Q. And that surplus account refers to surplus of The Connecticut Company, doesn't it? A. Yes, sir.

Mr. Martin: The point of this testimony is to show that the figures with regard to C. R. & L.'s net operating income submitted by counsel for the New Haven are too large. There is $12,000,000 in there.

554

Mr. Garfield: In where?

Mr. Martin: In the reports that I read in. That reflects abandonments and an item of loss on road and equipment retired, some of which was obviously the leased property. I cannot tell how much.

Hincks, J.: Over eleven years you say there is an aggregate of $12,000,000 written off for the System?

Mr. Martin: Yes.

555

Hincks, J.: But there is nothing in the record to show how much of that write-off was applicable to C. R. & L.

Mr. Martin: No, there isn't.

Hincks, J.: And until there is, what significance has this?

Mr. Martin: It is not necessarily quantitative, but it is qualitative. It shows that the figures submitted by the counsel for the New Haven on Monday are too high.

Hincks, J.: What figures, specifically? Exhibit 11, do you mean?

556

Mr. Martin: Yes, sir. Oh, yes, Exhibit 12, X-12.

Hincks, J.: No. You did not submit 12 on Monday. You submitted it today.

Mr. Martin: I know, sir. I did not get the figures until Monday. They gave them to me after Court closed on Monday. I did not have them Monday.

Hincks, J.: The fact, if it be a fact, that Connecticut Company charged off $12,000,000 in this eleven-year period, covering the whole System, I

557 am unable to see has any connection with anything on Exhibit 12, which I understand relates to operating income only of C. R. & L.

Mr. Martin: The property which was written off because it was retired consisted in part of property of The Connecticut Company and, in part, property of C. R. & L.

Hincks, J.: That is not quite in accord with the evidence.

Mr. Martin: With what, sir?

Hincks, J.: With the evidence. The evidence was that the 12,000,000 included C. R. & L. property,

558 if any was written off in those years.

Mr. Martin: Yes.

Hincks, J.: But what the amount, or what the proportion was, does not anywhere appear.

Mr. Martin: No.

By Mr. Martin:

Q. Mr. Leete, do you know whether any C. R. & L. property was retired during this period between 1935 and 1925? A. I haven't any doubt of it.

Q. Not the slightest doubt, have you? A. No, sir.

559

Q. You know that in certain of the so-called C. R. & L. territory, the trolleys were abandoned and busses were installed, for instance, don't you? A. Yes, sir.

Q. Can you give me any idea what that property during this eleven-year period amounted to? A. If you will give me one of those reports, I think I can give you some idea.

Q. Do you want any special year? A. Any year.

Q. Oh, because it is itemized? I hand you the year 1933. A. If you can get me started——

560

(Discussion off the record between Mr. Martin and the witness.)

Q. I ask you whether, examining this report of the Public Utilities Commission, you can tell what properties were included in this item in that year, not what properties were, but whether any of the properties were C. R. & L. properties? A. Yes, sir.

Q. Were they? A. They were.

Q. Can you tell from there what value was placed on particular properties? A. Yes, sir. Oh, they are all itemized, aren't they?

561

Q. Will you please read out the C. R. & L. properties from that 1933 report which were retired or abandoned, with the amounts? A. This is subject to the reservation that I am depending upon my general knowledge and this description to identify C. R. & L. territory.

Q. Well, Mr. Leete, resolve every doubt that you have in favor of The Connecticut Company so that this is a conservative statement. A. Well, I will read the doubtful items and let them be resolved on the record.

Q. Will you read the sure ones first, and check them off, please? A. New Britain, abandonment of line, Arch Street, $30,631.74. Waterbury, abandonment of line, Horwin Street, $4,822.35.

562 *Percy R. Leete—For Petitioner—Direct.*

Q. I think you can shorten it up by just saying "Waterbury." A. Milford, trolley express siding, $1,562.78. Then there is an item called "System, Various Sales and Exchanges of C. R. & L. Company Property, $1,505." I will see which is the black-faced type here. (Pause.)

(Discussion off the record between Mr. Martin and the witness.)

Mr. Garfield: If your Honor please, I do not know whether Mr. Martin expects to go through eleven years this way. It will take about eleven
563 years to do it. If he has any such purpose in mind, perhaps we could agree on some statement which could be submitted after the hearing, or have a further hearing later if we could not agree. It is going to take the rest of the day to go through this in this manner.

Hincks, J.: Don't you think this can be shortened by conference?

Mr. Martin: I will offer to shorten it on a 30% basis. Mr. Garfield has stated in Court that approximately 30% of the property——

Mr. Garfield: No, sir.

564 Mr. Martin: (Continuing)—was C. R. & L. property. If he will take the 30% basis, I will take 30% of the 12,000,000 as applicable to C. R. & L. without further investigation, if he is willing to do that.

Mr. Garfield: I do not believe the Judge would let me if I wanted to, but I do not want to, Mr. Martin.

Mr. Martin: What I have to do here is to show that on the retirement of my property from use, they never charged it off in any way against income, although the C. R. & L. lost it and it ought to have been depreciated or charged in some way

against our income, thus reducing our income. They merely charged it against their own surplus, in which we had no interest at all. That indicates that the Exhibit X-12, which is their figures, shows our income as too high. I am willing, if the Court wishes, to submit a schedule afterwards which shall be gotten up by Mr. Leete. 565

That is pretty generous.

Mr. Garfield: I would like to suggest this thought, Mr. Martin. You will be owing us money if you are not careful, because if you take 30% of 12,000,000 out of those eleven years you are going to have a minus figure left. What will you do with that when you get it? Doesn't that suggest to your mind the absurdity of this line? 566

Mr. Martin: Would your Honor want me to try and make a deal with Mr. Leete to submit this in schedule form?

Hincks, J.: I think it would be more convenient for us all, and more satisfactory.

Mr. Martin: Do you think Mr. Leete would be willing to do that?

Mr. Garfield: As far as figures are concerned, I think we can agree on a statement which will save the Court and everybody else a great deal of time. But I just do not see what these figures are going to do. If they mean that we have been losing money every year, why, that just "ain't so". I do not know what Mr. Martin thinks he is going to prove by it, but he is proving so much that it is making his proof ridiculous. 567

Hincks, J.: Why isn't the simplest way to handle that to let it come in by this schedule prepared later, subject to the objection that it is immaterial, with a ruling reserved? Then Mr. Martin can write a brief

568 *Percy R. Leete—For Petitioner—Direct.*

on the fact and if that task convinces him that it is not getting him anywhere, why, I will not have to make a ruling. If, however, he wants to persist in making the point, why, I will consider the matter in the light of the answering brief, and attempt to arrive at an understanding of the matter, which I confess I have not fully acquired as yet.

Is that satisfactory from a procedural standpoint?

Mr. Martin: Yes, sir.

Mr. Garfield: Yes, sir.

569 Hincks, J.: Very well.

Mr. Martin: Well, now, we come back to Exhibit X-2D, which was one of the X-2 exhibits based on the figures given to us by counsel for the New Haven plus the three years of our own figures. This has not been offered in evidence, but it has been marked for identification. I would like to offer it in evidence, subject to being corrected by Mr. Leete's schedule showing what the income for the years involved really was. What I am trying to say is this. I have figured out Schedule X-2D on the basis of Mr.

570 Wells' and Mr. Garfield's figures, and I think their figures are wrong. But nevertheless, I think that this is an exhibit that ought to be offered in evidence for what it is worth, and I would like to not only reserve the right to impeach this by showing that the figures were wrong, but I would also like to be able to have it in evidence so that it could be used as some kind of a yard-stick in case the Court should decide that none of the exhibits completely answer his requirements for trying to find out what these damages amount to, and so I offer Exhibit X-2D in evidence.

571

Mr. Garfield: I object on the same grounds as the other X-2 exhibits.

Hincks, J.: The admissibility of 2D concededly will depend on this schedule that it is proposed to submit later, will it not?

Mr. Martin: The admissibility, sir?

Hincks, J.: Yes. Isn't it linked up with this proposed schedule?

Mr. Martin: Well, I do not know what the schedule is going to show. In my opinion, X-2D shows the income too high. It is certainly admissible, because it is practically an admission by the New Haven as to what the income is. These, as I understand it, are their figures. So I am offering their figures in evidence, with the reservation that I want to get the figures from Mr. Leete and show that their figures ought to be reduced.

572

Mr. Garfield: I may say, your Honor, that the same infirmity applies to X-2C, to the extent that it uses figures obtained from us, as to X-2D. Exhibit 2C has already been admitted, with its companion, X-2CC.

Mr. Martin: All the X-2 series.

573

Hincks: I will admit 2D with exceptions to columns 9 and 10.

(Exhibit X-2D for identification marked Exhibit X-2D in evidence.)

Mr. Martin: And I also offer in evidence Exhibit X-2DD, which is the list of figures secured from New Haven counsel.

(Exhibit X-2DD for identification marked Exhibit X-2DD in evidence.)

Mr. Martin: That is all I have from Mr. Leete. Have you my book, Mr. Leete?

574 The Witness: Yes, sir, I have. (Hands book to Mr. Martin.)

Cross-examination by Mr. Garfield:

Q. Mr. Leete, after we gave to Mr. Martin on Monday the statement which he has introduced as X-12, covering the years 1925 to 1935, inclusive, did you, at our request, have the figures checked and also have allocations prepared for certain other years along the same line? A. Yes, sir.

575 Q. Did you find that there were certain figures on the exhibit which is now X-12, which were in error?

The Witness: May I see that X-12, to make sure?

Mr. Martin: X-12 is not in evidence, if you want to put it in. I just marked it for identification.

A. Yes, sir, I think there was.

By Mr. Garfield:

576 Q. I call your attention to the figures for 1925 to 1929, 1935, inclusive, under the heading, "C. R. & L. Taxes". Did you find there was an error in those figures? A. That is correct. There was an error in those figures.

Q. There was an error in those figures? A. That is right.

Q. Have you prepared a statement correcting those figures and adding the years 1921 to 1924, inclusive, to the statement which is marked Exhibit X-12 for identification? A. Yes, sir.

Mr. Garfield: I would like to have this marked for identification, if your Honor please.

577

Mr. Martin: Is that X-12 you are putting in?

Mr. Garfield: No, that is another one. This will be called "X-13 for identification".

Hincks, J.: Wouldn't it be more simple to start a separate series and call this "Y-1"?

(Exhibit Y-1 for identification: Statement of Estimated Operating Income of The Connecticut Railway & Lighting Company Property—Years 1921-1935 Inclusive.)

Mr. Garfield: I understand that X-12 for identification has not been received in evidence.

578

By Mr. Garfield:

Q. Mr. Leete, will you explain what the errors were for the five years, 1925 to 1929, in the composition of C. R. & L. taxes? A. In the original statement which had been given to Mr. Martin, which I believe was X-12 for identification, in computing the C. R. & L. taxes other than income taxes we had computed the gross revenue tax by multiplying the C. R. & L. Company operating revenues by a figure of 3%. Then there were certain——

Q. Why did you use 3%? A. That being my understanding of the tax rate.

579

Q. That is the Connecticut gross revenue tax? A. Yes, sir.

There were certain local taxes and real estate taxes. And we had taken the proportion of C. R. & L. operating expenses as shown from the statement to the System operating expenses as shown on the statement, and applied that ratio to these local taxes, so-called, in order to find a proportion that should be allocated as C. R. & L. taxes. It afterwards occurred to us that the local real estate taxes, when paid, operate as a credit against the payment for gross revenue taxes of 3%, so we have made adjustment.

580 Q. And are the figures, as they now appear on Exhibit Y-1 for identification, correct, as you understand them? A. I believe those figures are as correct as we can produce. Yes, sir.

Q. Now, will you look at the four lines at the bottom of Exhibit Y-1 for identification, covering the years 1921 to 1924, inclusive. Are those lines prepared in precisely the same manner as the information for the years 1925 to 1929? A. Yes, sir.

Q. And from the same records? A. From the same
581 type of record.

Q. And that work has been done since we left here on Monday? A. Yes, sir.

Q. Why didn't you go back beyond 1921? A. The time limit——

Q. Where are the records from 1920 back? A. My recollection is that at least, maybe, the tax records are up in Hartford and I think, doubtless other records.

Q. Is it a fair statement that you have furnished in this exhibit the split between C. R. & L. and the balance of the System for all the years for which you have the records available here? A. Well, all that was to be done between
582 the close of Court yesterday and the opening this morning. I would say yes.

Q. The information contained on this exhibit for the years 1925 to 1935 was all prepared, except perhaps for the last three months of 1935, back in 1935, was it not? I think you have already so stated. A. Will you repeat that question?

(The last question was read.)

A. Yes, sir, with one slight exception which I should have explained earlier, and that is that in the figure for 1935, under the outside column, C. R. & L. operating income,

583

there has been an adjustment made in those figures by adding in the results of operation of the controversial bus routes for the last fourteen days of 1935.

Q. Have you, Mr. Leete, had prepared a statement showing the net operating income from the controversial bus routes which were awarded to the C. R. & L. by Order No. 62A of this Court? A. Yes, sir, I requested such a statement to be made.

Q. Am I right in understanding that in Exhibit Y-1 for identification there is no income credited to the C. R. & L., except for the last fourteen days of 1935, on account of the operation of those controversial joint bus routes? A. That is right.

584

Q. I show you a statement headed, "Operating Income of the Controversial Routes Awarded to the C. R. & L. Company by Court Order No. 62A from the Date of Their Institution", and ask you whether that has been prepared under your direction? A. That was prepared for me, but I would like to add that it was prepared so recently that this is the first time I have seen it.

Mr. Garfield: I may say, your Honor, that if any question as to the detail of this comes up, we have another witness who actually prepared it and can be cross-examined on it, but I would like to mark it for identification at this time as Y-2 for identification.

585

(Exhibit Y-2 for identification: The Connecticut Company: Operating Income of the Controversial Routes awarded to the C. R. & L. Co. by Court Order No. 62A from date of their institution.)

Q. Mr. Leete, in this exhibit, do the figures shown in the column headed, "Amount", represent the net operating income which would have accrued to C. R. & L. if the Con-

586 troversial joint bus routes had been its property during the period covered? A. Yes, sir, that is the theory under which this was set up.

Q. Now, for the years 1937 and 1936, these figures are reflected in the joint accounts, or were in the C. R. & L.'s own accounts or in the joint accounts which you and C. R. & L. have prepared, are they not? A. That is correct.

Q. And for the last fourteen days of 1935 they are the same? A. Yes, sir.

Q. Prior to that time, these figures do not appear in
587 your Exhibit Y-1 for identification? A. No.

Q. And as these controversial joint bus routes have now been awarded to the C. R. & L., should these figures for the period prior to the last fourteen days of 1935 be added to C. R. & L. net operating income, in order to show the earnings of its property? A. Yes, sir.

Hincks, J.: Are these figures in Y-2 net income?

By Mr. Garfield:

Q. The heading is "Operating Income", Mr. Leete. Are these net income or gross income? A. That is the operating income after revenues less expenses and less taxes.

588 Q. That is comparable to the last column in Y-1, headed "Operating Income". Is that it? A. Yes, sir.

Mr. Garfield: Does that answer your question, your Honor?

Q. Now, Mr. Leete, while you have not had time to go back of 1921 to make the separation of revenues, expenses and operating income as between C. R. & L. and the rest of the property of the Connecticut Company, have you the net operating income of The Connecticut Company, all the way back to the beginning of the C. R. & L. lease? A. System report.

589

Q. System? A. Yes, sir.

Q. In other words, for the years 1907 to 1935, inclusive? A. Yes, sir.

Q. I show you a statement entitled "Operating Income of The Connecticut Company and C. R. & L. Company Combined Before Federal Income Taxes", and ask you whether that is a statement of the figures that I have just referred to? A. That is the statement.

Q. And was this prepared under your direction? A. Yes, sir.

Q. Is it correct, according to your information? A. Yes, sir.

590

Mr. Garfield: May that be marked as Exhibit Y-3 for identification?

(Exhibit Y-3 for identification: The Connecticut Company: Operating Income of The Connecticut Company and C. R. & L. Company Combined before Federal Income Taxes.)

Mr. Garfield: Mr. Martin offered this morning an exhibit which was marked X-11. Was that admitted? The ratio.

Mr. Martin: Yes, I think so. I think that is in.

591

Mr. Garfield: It shows the ratios of Connecticut Railway & Lighting to Connecticut Company System of total operating revenues to the operating expenses, and net operating revenue for the years 1925 to 1934, inclusive, and the first nine months of 1935, which is dated December 2, 1935.

By Mr. Garfield:

Q. I ask you whether, since Monday, you have had that exhibit revised to reflect the inclusion of the joint bus route revenue, and to include the years 1921 to 1924, and

592 to include the whole of 1935 and the years 1936 and 1937? A. Yes, sir, I have asked to have that done.

Mr. Martin: Is this Y-4?

Mr. Garfield: I would like to have that marked Y-4.

(Exhibit Y-4: The Connecticut Company: Percent of Connecticut Railway and Lighting Company to Connecticut Company System Total [Including operation of Controversial Routes awarded C. R. & L. Co. by Order 62-A].)

593

By Mr. Garfield:

Q. And I ask you whether those figures are correct, to the best of your information? A. Subject to what I said about the controversial bus operating routes, they are.

Q. Now, these figures differ slightly from the revenues shown in X-11 in some instances, do they not? A. I haven't X-11, but I expect they would.

Q. I think they probably do in every instance. A. I am sure they do.

Q. The reason for that difference from the figures that 594 are shown in X-11 is the inclusion of the joint bus routes? A. That is right.

Hincks, J.: You mean by "joint bus routes", the controversial routes?

Mr. Garfield: The controversial portions of the joint bus routes. Wherever I have referred to joint bus routes or controversial routes, I mean the portions which were in issue between us and which your Honor awarded to C. R. & L. As you will readily understand, before that award, as we were claiming those portions, we included the revenues

595

and expenses of the net from them in our figures. And, therefore, earlier figures for the C. R. & L. including those that were prepared in December '35, include those expenses as Connecticut Company, as distinguished from C. R. & L., so that we have now corrected those ratios to include the revenues from those controversial routes.

By Mr. Garfield:

Q. Will you look at Exhibit Y-4, Mr. Leete, for a moment, at the last column? I call your attention to the fact that in 1921, C. R. & L.'s net operating revenue was only 16 and a fraction percent of the total System. It then jumped up to 29 and a fraction, 32 and a fraction, 30 and a fraction, and it ran along as shown in the exhibit in the upper 20's or lower 30's until 1931. From then on, for three years it was down around 15 to 17, and by 1937 it had gone up again to over 30. Am I right in understanding that those figures mean that the proportion of the System earnings—and I am using "System" now to include both Connecticut Company and C. R. & L., even down through 1937—the proportion of the System earnings, net earnings, which accrued to C. R. & L., was greater in years of prosperity than in years of depression.

596

597

Mr. Martin: Hold on. Excuse me. I object to that unless he designates particular years, and then we conduct an investigation to find out whether they were prosperous or not. The exhibit speaks for itself.

Hincks, J.: I think counsel may properly ask the witness if that is what the exhibit says.

By Hincks, J.:

Q. It appears to me that that is what the exhibit does say, and I would like to ask the witness to check my under-

standing. That is all. Is that so, Mr. Leete? A. I think that may be held to be generally true.

By Mr. Garfield:

Q. To carry that a little further, I would like you to compare Exhibit Y-3 with Exhibit Y-4 insofar as they cover the same period. Is it true in general that the years in which, as shown by Exhibit Y-3, the net operating income of the Connecticut Company System was high, or the years in which C. R. & L. earned a larger proportion of
599 it? A. I believe that is a substantially correct conclusion.

Q. Now, looking at Exhibit Y-3 again, prior to 1921, is it true that there were about three or four years of low net earnings for the System? A. The statement so shows.

Q. And that prior to that there were about nine or ten or eleven years of earnings comparable to those during the 1920's? A. Yes.

Q. And that in 1907 there was a period of somewhat lower earnings? A. Yes.

Q. Is it true that there was a generally recognized depression in this country about 1907, for a brief period?

600 Mr. Martin: Generally recognized what?
Mr. Garfield: Depression.
Mr. Martin: Oh.
Mr. Garfield: In 1907.

A. Thereabouts, yes, sir.

By Mr. Garfield:

Q. Is it true that there was a generally recognized depression in this country from the period from about 1918 to 1920 or 21? A. That is particularly true of 1920.

601

Q. Is it true that the period from 1908 till about 1917 was generally recognized as a period of normal or prosperous times? A. Well, there were certain interruptions there, on account of the war scare in 1914. But we very quickly bounded into war prosperity, from 1917.

Q. Is it true that sometime in 1921 until about 1930, was another period of general prosperity? A. Yes, sir.

Q. And that since then there has been a period of depression, depression followed by recession? A. Well, I would call the depression perhaps beginning around about the latter part of 1930. We had the start of it a little before that.

602

Q. Is it true that in 1937 conditions generally became more prosperous for a while, or perhaps beginning in the latter part of 1936 and running until the latter part of 1937? A. Yes, there was quite a pick-up in 1937.

Q. And during the latter part of 1937 to 1938, there was a recession? A. Very acute in the latter part of 1937, continued in the early part of 1938.

Q. Are you familiar with the character of the territory in which the C. R. & L. business is done, in general? A. Well, in the sense that I can distinguish in my mind the difference between Bridgeport and Hartford, for example, yes, and Waterbury.

603

Q. What are the cities and large towns in which C. R. & L. operates? A. I should say the two larger ones were Bridgeport and Waterbury, which are predominantly industrial.

Hincks, J.: Can we take a recess at this point?

Mr. Garfield: Yes, sir.

Hincks, J.: A breathing spell in equity.

(At 4:20 P. M., a short recess was taken.)

604 *Percy R. Leete—For Petitioner—Cross.*

PERCY R. LEETE, a witness called on behalf of Connecticut Railway & Lighting Company, resumed the stand and testified further as follows:

Cross-examination Continued by Mr. Garfield:

The Witness: Mr. Garfield, before I completely answer the last question, I would like to correct one statement I made.

Q. Go ahead. A. I said that the first of the depression
605 was in 1918, into which you led me by your question.

Q. I apologize. A. But as a matter of fact, 1918 was really the last year of the so-called war prosperity and there was a slight fall-off in 1919 followed by a recovery; but then the primary post-war depression started in 1920. And it was rather acute through the year 1922.

Hincks, J.: I think I might observe at this point with reference to that figure for 1920 that looks so out-of-line, that I rather associate that date with dissolution proceedings, which I think divorced the stock of The Connecticut Company from the New
606 Haven for a period. It seemed to me it was just about that time.

Mr. Garfield: If I may be permitted to say, your Honor, I think that is true. There was a decree of the Federal Court, as you remember, somewhat earlier than that, which turned stock over to the Trustees appointed by the District Court for Southern New York. Those trustees were ordered by the Court to sell stock, and for several years they operated the property for the purpose of selling, rather than making money out of it, and it was about this date—I haven't it exact—when the decree

607

was modified and they did not have to sell it, but turned it back when things began to improve a little.

The Witness: If I might be permitted to add to that, that if you were looking at those figures for The Connecticut Company for 1920, I think the further reason was that it was in that year, if my recollection was right, that the jitney situation in Bridgeport was so acute, and there was two months when we had practically no operation down there; and I think it was about that time that we took in what is now the New London division.

608

By Mr. Garfield:

Q. That was in 1920, was it? A. I think it was in 1920.

Q. That was in Connecticut Company territory, not C. R. & L.? A. Yes, sir.

Hincks, J.: I think, if I may be permitted to enlarge the record, I have personal recollection that I participated in a hearing in favor of jitneys in Waterbury in that year, 1920.

Mr. Garfield: Perhaps we had better call you as a witness.

609

Hincks, J.: 1920, I think, can we not agree, is the date at which the jitney competition was at its peak.

Mr. Garfield: Yes, sir.

By Mr. Garfield:

Q. Mr. Leete, you referred to the depression in 1918 or 1919, or perhaps it was 1920, as the primary depression. Is there any significance in that year? A. I do not claim any originality. It is the expression that Colonel Leonard

Ayers, of the Cleveland Trust Company used. He talks about primary post-war depressions and secondary post-war depressions.

Q. Does he show in that chart that there is always a primary post-war depression and always a secondary post-war depression? A. That is what he has shown for the War of 1812, and the Civil War, and the World War, which chart goes back to 1790.

Q. What does he show as to the relation of the two to each other? A. The secondary post-war depression in
611 every instance seems to be of greater length than what he calls the primary post-war depression.

Q. Now, I was asking you about the cities and towns in which C. R. & L. operates, and I think you offended Mr. Martin by your reply. Would you start all over again?

Hincks, J.: Offend him again?
(Laughter.)

A. Well, I will try to mollify him now. He told me he lived near South Norwalk, so I am going to include South Norwalk as one of the major cities in the C. R. & L. territory. What I was going to say was that in a city like Hart-
612 ford, for example, which is purely in Connecticut Company territory, while there is, of course, a great deal of industry up there, probably there is a preponderance of insurance business. And I was of the personal opinion that when we do get into a depression, that business of that type does not fall off as rapidly as these industrial concerns.

Q. Hartford is also the State Capitol, is it not? A. Yes, sir.

Q. And the State business does not necessarily fall off with depression? A. I am afraid it increases.

Q. Is New Haven another city in The Connecticut Company territory? A. Yes.

613

Q. Is there something here besides industry? A. Well, I will put New Haven in the twilight zone. It is between Hartford and Bridgeport. Of course, there is the University here.

Q. The University does not shrink in depressions, does it? A. I imagine not.

Q. Do you know what proportion of The Connecticut Company territory, as distinguished from C. R. & L., Hartford and New Haven constitute? A. Well, I know they constitute a vastly greater proportion of The Connecticut Company itself, and if we can fall back on your 30% figure

614

where that could be related——

Q. I don't mean that. I mean considering only the Connecticut Company territory, and omitting C. R. & L. territory, do you know approximately what proportion of The Connecticut Company business is done in Hartford and New Haven? A. Well, I don't know the figure, but it is proportionately very large.

Q. You know that those two together constitute well over half the business? A. Oh, unquestionably.

Q. Would you say as high as three-quarters? A. I think I would content myself with my answer that it was by far the greater part.

615

Q. Reverting to the C. R. & L. territory, is it fair to say that all of the cities and towns are industrial cities and towns? A. Well, I should think they could be so characterized, yes, sir.

Q. And industrial in the sense that when a depression occurs they are more severely affected than places like New Haven and Hartford? A. That would be my opinion.

Q. And by the same line of reasoning, when a depression ceases, they would more immediately respond to good times? A. I would expect they would recover more rapidly.

Mr. Garfield: If your Honor please, I offer in evidence Exhibits Y-1, Y-2, Y-3 and Y-4.

Hincks, J.: Very well.

616 (Exhibits Y-1, Y-2, Y-3, and Y-4, for identification marked Exhibits Y-1, Y-2, Y-3, and Y-4 in evidence.)

Mr. Garfield: Did you accept them?

Hincks, J.: They were marked without objection.

Mr. Garfield: I have no further question of Mr. Leete.

Redirect examination by Mr. Martin:

Q. Mr. Leete, do you know in the year 1930 what proportion of the combined business of The Connecticut Company was bus and what was trolleys, in 1930? A. No,
617 I do not, Mr. Martin.

Q. Do you know, in 1931? A. No, I really do not know, in any year.

Q. Do you know, in any year? A. No, sir.

Q. Do you know in what year The Connecticut Company first began to use busses? A. Why, I think it was between 1920 and 23, but I am not dead sure.

Q. I think you said that New Haven and Hartford contributed more than half of The Connecticut Company's business. A. Yes, sir.

Q. Have those two cities got trolley cars? A. Yes, sir.

618 Q. Not busses? A. Both.

Q. Both? A. Both. Both cities have both.

Q. Both cities have both? A. Yes.

Q. When you said that they contributed more than half of the business, you had in mind both services? A. Yes, I was not distinguishing.

Q. And is New London part of your territory? A. Yes, sir.

Q. Has that got trolleys? A. No, that is all bus, now.

Q. That is all busses. Are there any other places in the state, beside Hartford and New Haven, that are part of The Connecticut territory where trolleys are still used? A. No, sir.

619

Q. Those are the only two cities? A. Yes, sir. Some suburban runs, of course, from the cities.

Q. Interurban? A. No, some suburban runs.

Q. Suburban runs. Where trolleys are still used? A. Yes.

Q. Do you know when C. R. & L. first used all busses?

Mr. Garfield: It is in the record.

A. Well, I think it is in the record, but it was very shortly after you people took it back.

620

By Mr. Martin:

Q. Do you know when C. R. & L. began to use busses? You said you didn't, didn't you? A. No, I don't know.

Q. When you look at Exhibit Y-1, the fall-off in C. R. & L. operating income occurs in 1932; is that right? A. The low point is in 1932, but the fall-off, you see, started after 1930. '31 was substantialy lower than '30.

Q. That is true. And do you conceive that it is possible that the fall-off in the operating income might be due to the higher expense of operating busses, perhaps, than trolleys? A. Well, I would suppose that the depression in 621
1932 was the chief reason for that poor showing.

Q. Well, I think it is the chief reason for $78,000. A. Yes.

Q. Operating income. But as you say, the fall-off began after 1929, and wasn't it about that time that busses began more and more to be introduced? A. They have been gradually climbing up in their proportion, yes, sir.

Q. The use has gradually increased in proportion? A. Yes.

Q. Do you know whether, from an operating standpoint busses or trolley cars are more profitable? A. Why,

622 I am not an operating man, and the question of whether they are at the moment more profitable is not always the controlling reason.

Q. I do not mean whether at the moment they are more profitable, but I mean, in your experience as an expert on depressions or otherwise, you might be able to tell us whether a company would make more money out of a prosperous trolley operation or out of a prosperous bus operation. A. Well, I would suppose that if you changed over from trolley operation to bus operation, it would be because you expected to improve your position, expected to
623 make more money.

Q. Yes, quite. But I take it that in the City of New Haven, the change-over from trolleys to busses has not yet been made because the operating people think it is not desirable. Isn't that the reason? A. Well, the reason—yes. Not desirable. Yes.

Q. Hasn't yet become necessary. A. Well, I would like to qualify an answer to that, because it is rather difficult to answer that yes or no.

Q. All right. A. If, for example, the City were going to repave one of our lines where the traffic could be handled by
624 busses, although at the present time it is being handled by trolleys, and if as a part of that repaving program we would have to stand a large share of the cost of paving, and fix up our rail and lay new ties, and invest considerable money in re-servicing the track and accessories, we might think then that it was better not to do that, even though at the moment the revenues from bus operation might conceivably be less than what we would experience by continued trolley operation.

Q. It is a fact, though, that comparative statistics of operations between the Connecticut Company and the C. R. & L., based on combined operation or separate operation, rest on the fact that the two cities that contribute more

than half of The Connecticut Company's present revenues are still using trolley cars, whereas C. R. & L. uses all busses? A. I am afraid I do not understand that question, Mr. Martin. 625

Q. Well, I remark, and I ask you if you agree with it, I remark that more than half of The Connecticut Company's revenue now comes from two cities where they have trolleys, and that the entire revenue of the C. R. & L. comes from the operation of busses. A. Yes.

Q. And so, I remark that a comparison of either trends or expenses or operating ratios is subject to the remark that they are running somewhat different kinds of busses. Is that fair? A. It is subject to the remark, but I do not know that the remark is fairly applicable, because you have got to take other things into consideration. 626

Q. Let's take them. What are they? A. The differences between the extent of the business that is done in Hartford and in New Haven, and the extent of the gross business that is done in Bridgeport, for example.

Mr. Martin: That is all. Thank you.
Mr. Garfield: That is all.
Hincks, J.: Thank you.
(Witness excused.) 627

Mr. Martin: I state on the record that, pursuant to an appraisal by qualified appraisers, that the value of all the C. R. & L. property used in transportation, plus the value of all the property received by it from The Connecticut Company not used in transportation, by which is intended to exclude any property under lease to the Connecticut Light & Power Company, this value was, as of December 31, 1938, $3,407,027. And I understand that I have an agreement with counsel for the New Haven that this statement may be taken as evidence.

628 Mr. Garfield: That is my agreement, your Honor, except that I object to the statement as being immaterial. We discussed this the other day, and I would like to object to the statement being made in the record on the same ground that I urged the other day. I will repeat it, if your Honor cares to have it.

Hincks, J.: I am prepared to overrule the stated objection.

Mr. Garfield: May I have an exception.

Hincks, J.: Exception.

629 Mr. Garfield: And I would like to ask one or two questions about it. Would you state in the record how many busses are included in that valuation, and what total figure?

Mr. Martin: The busses included in the appraisal consist of 107 busses taken over from The Connecticut Company, valued as of December 31, 1938 at $170,251,—with some fare boxes I am going to leave out—and 211 busses purchased by the C. R. & L., the value of which on December 31, 1938, was $1,291,686.

Mr. Garfield: Are those 107 busses that you took over from us all of the busses that you took over from us?

630 Mr. Martin: No.

Mr. Garfield: Do you know how many more there were? I think it may be in the record, but just as a matter of convenience, how many more you took?

Mr. Martin: I understand we took over 21 more busses, Mr. Garfield.

Mr. Garfield: That is all I wanted to ask.

Mr. Martin: Now I offer in evidence a document called a finding made by Public Utilities Commission, dated August 24, 1938, in the matter of the Petition of Benjamin N. Leipner for a reduction in the rate of bus fares charged by the C. R. & L. in the City of Bridgeport, and I offer this in evidence simply for the purpose of indicating that

631

C. R. & L. is a company subject to the Public Utilities Commission, which the Public Utilities Commission may be expected to deal with in connection with the fixing of rates. I have only got one copy of this.

Hincks, J.: That appears as a matter of law, does it not?

Mr. Martin: What is that?

Hincks, J.: It is a necessary conclusion of the statute law of Connecticut, isn't it?

Mr. Garfield: In my opinion.

Hincks, J.: There is no question about that.

632

Mr. Garfield: I am quite willing to agree to that. I do not know why we should have a record before the Commission to prove it. I object to it.

Hincks, J.: If it is agreed to, you will have to pick another fight.

Mr. Martin: I think it is agreed to.

I offer in evidence a certified copy of a finding and order by the Public Utilities Commission, made May 10, 1933, in connection with electric, gas and water service in certain towns in Connecticut, and particularly I invite attention to Page 24 of this finding and order, in which the Commission determines that a minimum fair rate of return to the company on the fair value of its entire property from combined operations is 6.5%. And the rates have been adjusted, as I understand it, by the order so as to make that return to the Northern Connecticut Power Company, which was the Public Utilities involved.

633

That is offered for the purpose of showing that it is likely that the Public Utilities Commission will or will try to so adjust fares to insure a return of not more than 6.5%, on the fair value of the property invested.

Mr. Garfield: I object to that, your Honor, on several grounds.

Hincks, J.: State them.

634 Mr. Garfield: The first is that that is not a bus company. The second is that it says that it sets a minimum of 6½% which Mr. Martin twists around into a maximum. The third is that, as your Honor well knows, you can find all kinds of figures in Public Utility and Court decisions for fair rates of return. The only rule that you can make is that the Commission or the Court considers the individual case and determines what it believes to be fair under the individual circumstances, and there is no rule that 6½% or any other percent will be universally applied.

635 Mr. Martin: I respectfully suggest that Mr. Garfield's remarks go to the weight of this evidence, rather than to the question of whether it is really admissible. As I read this opinion, I understand that they reduced the rates in the electric department, so that the return on the combined property, water, gas and electricity, should be 6.5%. The opinion speaks for itself, but that is the conclusion that I draw from it, and I would like to offer it for the purpose of showing what the Public Utilities Commission has done in connection with Public Utility companies.

Hincks, J.: No doubt there is the possible distinction between such utilities and transportation companies.

636 Mr. Martin: That is true. There is no Public Utilities case involving passenger busses.

Mr. Garfield: And furthermore, your Honor, this is a very delicate situation. It is well-known that bus companies have an investment which consists largely of busses. Trolley companies, steam railroads, other utilities have large fixed investment. Now, the Utility Commissions themselves are very much embarrassed, and I think that there are plenty of instances where they have side-stepped the issue in a bus case, just because they realize that if bus fares are to be put on any basis that is comparable with ordinary transportation fares, the profit will be out of line with that of trolley or street railway properties if

related solely to physical investment, because the situation is so completely different. It is not a situation on which the Utilities Commissions have yet made up their minds, and it is not accidental that they have not. Mr. Martin admits there are no cases. The reason there are no cases is that not only the companies but the Commissions are leery of the subject, and they do not want to get into the subject. You cannot prove as a fact that the Utility Commission in Connecticut has not or will not allow a rate of return of 50%, or any other percent you want to name, because they just have not made up their minds. And they cannot apply to bus properties the rules that have been applied to other transportation properties with large, fixed investment. Furthermore, this whole business of rate of return in Commission and Judicial decisions is not a matter of evidence. It is a matter like any other, where you cite on your brief the rules that have been laid down. If Mr. Martin wants to bring in cases, if he can find any, that may appropriately be done on his brief. But he does not have to prove as a matter of fact what is really a matter of law, and I object to this.

Mr. Martin: Your Honor, I was wrong when I said there were no cases, because, of course, we had a case ourselves in Bridgeport.

Hincks, J.: Yes, but that case——

Mr. Martin: (Interrupting)—that is the one I spoke of first in which the rate of return appeared to be 3½% on the capital invested, and the Commission said the rates could not be lowered in view of that, that that was not an unreasonably high rate, so there is that one case.

Mr. Garfield: That does not fix the maximum, does it?

Mr. Martin: I suggest that this case and the next one which I will offer are reasonably interesting to a trier of fact. They are not binding on him. It is an indication of what is likely.

640 Hincks, J.: I think they are not, strictly speaking, competent evidence. I think, however, that I might properly notice any existing opinions of the Public Utility Commission as a matter of judicial notice for what they may be worth.

Mr. Martin: Without my putting them in?

Hincks, J.: Without putting them in technically as evidence. How do you feel about that, Mr. Garfield? Do you think that under the liberal and enlightened rules of this Court I ought to shut my eyes to any decisions of the State Commission?

641 Mr. Garfield: Not if they are decisions which have a logical bearing on the situation, your Honor, but a decision which merely says that 3½% is not too high, certainly does not fix a maximum. And that is the only bus decision there is.

Hincks, J.: In other words, theoretically I can look at the run of their decisions, and if it were the fact that a rule could be deduced therefrom, I might deduce the rule.

Mr. Garfield: Well, I do not see how I could prevent your Honor from taking judicial notice of that if you cared to do so. It seems to me that it is analogous to any rule of law in which a decision is laid down.

642 Hincks, J.: It would seem so to me.

Mr. Martin: That is quite satisfactory to me.

Hincks, J.: Very well.

Mr. Martin: That completes the Claimant's proof.

Hincks, J.: I forget whether it is in the record or not, but ought it not definitely to appear, if it is the fact, that the only properties that the Claimant operates are those which it has received by repossession from The Connecticut Company?

Mr. Martin: Well, that is not quite true, because those are amplified and extended by new property that it has bought.

643

Hincks, J.: I mean as modified since the date of repossession.

Mr. Martin: Oh, yes, sir. Quite. That is right. And I am sure there will not be any remark about that. That is all the property we have.

Mr. Garfield: Well, I do not know.

Mr. Wells: Of course, you have the power property.

Hincks, J.: I said the property which the plaintiff operates.

Mr. Martin: We do not operate the Gas Company.

Hincks, J.: Very well. I think we will simply close the evidence in this case.

644

Mr. Martin: Yes.

Hincks, J.: And let the future, with the aid of counsel, take care of itself. We will consider, then, the record of fact is closed with the exception of this schedule that is coming in subject to objection.

Mr. Garfield: Your Honor, I would like to make a motion. I move that this claim be dismissed because it is not valid in law or in fact. The period covered by the damages for rejection of this lease was from the date of rejection until July 31, 2905, 969 years. The Claimant has introduced evidence which he himself calls evidence of actual facts, down as far as December 31, 1938, for three years and fourteen days. He has not introduced any evidence whatsoever of anything after that date, unless it can be found in inference from what he has shown for the earlier period. He has not produced an expert to talk about the rental value of his property. He has not attempted to forecast the future in any way except by making averages of 1½, 3, 10, 14 and 15 years in the past. I do not know whether I have got them all. There were a lot of them. He could have gone further back, if he had wanted to. But because certain things happened in the past, he argues that something is going to happen in the future, and he goes so far as to say that that something is

645

646 going to be the precise equivalent of the average of what happened over a certain period in the past.

Now, he does not even go beyond forty years with that, or 37 years in the future with that. There is no showing whatsoever, even on his own theory, beyond 1975. He has not attempted to lease his property for the balance of the term or for any part of the balance of the term to anybody else. He has not asked anybody its value. He has simply undertaken to operate it. And when he undertook to operate it he changed over from one type of
647 operation to another. Now, of course, at the time of change-over, there is going to be a period of adjustment, a period when earnings will not be as great as they will after the operation has become seasoned. Moreover, he is operating with a force of people who have not operated together before. Some of them were our ex-employees taken over with the property. Some were his own people, brought in from outside of New England. Now, they may be excellent operators. I haven't any doubt they are. I hope they are. But they have not been operating as a team, and, therefore, what they were able to produce in the first little while is not indicative of what they can do
648 for the future.

The period for which he has shown his results of operation includes the depth of the worst depression we have ever had. The periods which he has averaged to get his possible future earnings are all entirely within that depression, or they include seven years of that depression and considerably less than that of a more prosperous earlier period. That depression has been longer than the other depressions in the history of this company, and the earnings of the property during that depression have been very seriously affected. The earnings more seriously in C. R. & L. territory than in our territory.

Now, of course, I do not know that there is going to be an immediate boom starting this year, or even starting in

1940. But I think that your Honor will take judicial notice of the fact that there has never yet been a depression that has not been followed by a period of prosperity. And as Mr. Leete testified, the secondary war depressions have always been longer than other depressions.

If any inference is to be drawn from past earnings, it must not be an inference based on the depression period. And I maintain that Mr. Martin has not shown you any evidence which can possibly satisfy your mind that over the whole future this property is not going to earn a larger operating net than would be required to meet the rent, especially after the rent has been reduced to the figure which is mathematically implied in the Supreme Court's decision.

The only evidence which he has produced other than the sort I have just mentioned, which seeks to rebut the inference that there may be offsetting profits in the future, is the suggestion that, because he has seen fit to reduce the investment value of his property from something very much higher—we do not know just how much, but we know that on the books of the company it is 31,000,000—but because he has seen fit to reduce it from a very much higher figure down to 3,400,000, and because he is afraid that some Public Utility officials may try to hold him down to a particular percentage based on that, he will not, in the future, be able to earn more than that.

Now, that means that because he saw fit to abandon a lot of trolley property which was carried at a high figure on his books and on which, on his theory, he might have been allowed to earn a large net operating income, because he has seen fit to abandon that and substitute busses which show a very small investment figure, which he has done undoubtedly because he thinks he can make more money that way, because of all that, he says to your Honor: "I cannot possibly make more than $250,000 in the future, and therefore you must make the New Haven pay."

652 Now, he made the substitution of his own volition. We did not compel him to give up trolleys and go to busses. As I said, he undoubtedly did it because he thought he was going to make more money. If he thought he was going to lose money, he certainly cannot use that as his reason for suing us for damages. If he thought he was going to make money, then he ought not, in equity and in fairness, to be allowed to say that because he has thrown away a lot of property in the hope of making more money with busses, and because 6½% applied to his busses produces a lower
653 figure than 6½% or some other percent applied to a larger amount of property, for that reason he has supplied the evidence which will convince your Honor's mind that over 969 years he is going to have a loss by comparison with the rent.

That is not the type of evidence that satisfies the mind.

I want to say one word about the Supreme Court's decision. The Supreme Court decision did not lay down any new rule of evidence, as your Honor has pointed out. Mr. Justice Reed merely stated what had always been the rule in this type of case for the proof of future damages, namely, that they must be proved by evidence of a char-
654 acter entitled to real belief. They must not be mere speculation. The Supreme Court did say, however, that Congress, in putting the rather cryptic words into this statute which have caused us so much trouble, cannot be presumed to have put them in there through inadvertence. They put those words into this particular part of the reorganization bankruptcy statute instead of putting in an exact limitation as they did in 77B or in 63A. And in doing so, they called the attention of the Court in handling this kind of a case to the very rigid requirements which must be observed in deciding on evidence of this character. In other words, while there is no rule of evidence laid down, Congress went out of its way to caution the courts that they must be very careful only to use evidence that does satisfy the mind.

655

And I maintain that on consideration of all of the evidence which has been presented here, there is no showing that the damage for rejection, which as the Supreme Court finds, covers a period of 969 years, not a period of three years and a period of 966 years, or a period of forty years and a period of 929 years, but a single period of 969 years—the Supreme Court has said, and the statute says, that your Honor must find that for that period the damages which result from rejection will be such and such. And I maintain that Mr. Martin has not shown that, even though there has been a loss for the first three years, there will be a loss for the 969 years.

656

Hincks, J.: Isn't this fundamental subject matter that you would as leave answer in your brief, Mr. Martin, as at this time?

Mr. Martin: There is nothing that I want to say except one thing, and that is, with regard to depressions, that in 410 A. D., Alaric sacked Rome, and that was followed by a depression that lasted 740 years, known as the Dark Ages; so that they are not always followed by periods when you can make money. I call this to the Court's attention.

Hincks, J.: That is not as long as the term of your lease.

657

Mr. Martin: No, but it is pretty nearly as long as the term of my lease, and I will let the last 200 years go.

When shall we have briefs?

Hincks, J.: When do you suggest, gentlemen?

Mr. Garfield: Does that mean you are not going to rule on my motion at this time?

Hincks, J.: Yes, I think I had better reserve ruling.

Hincks, J.: So that you can refer to it on your briefs, let this after-born schedule that is coming in be marked Exhibit W.

Mr. Martin: All right, sir.

(Exhibit W [to be marked]: Schedule to be prepared by Percy R. Leete.)

(Hearing closed at 5:25 P. M.)

658 **Copy of Exhibit X-1 of March 13, 1939.**

Statements of Amounts Payable as Rentals by The New York, New Haven and Hartford Railroad Company on account of the Transportation Properties under the Terms of the Lease Agreement dated December 19, 1906 between Connecticut Railway and Lighting Company and The Consolidated Railway Company (now The New York, New Haven and Hartford Railroad Company) and Subsequent Agreements Related Thereto.

659

		(Col. 1) Annual Rentals Payable Under 1906 Lease Subsequent to 1914	(Col. 2) Portion of Annual Rentals Payable on Account of the Transportation Properties (¾ths of Col. 1)*
Amounts representing the annual interest on bonds outstanding as follows:			
Connecticut Railway and Lighting Company First and Refunding Mortgage 4½% Bonds. $13,257,000 principal amount of such bonds at 4½% per annum	$596,565.00		
Connecticut Lighting and Power Company First Mortgage 5% Bonds. $209,000 principal amount of such bonds at 5% per annum	10,450.00		
		$ 607,015.00	$ 455,261.25
660 Annual Sinking Fund Payments required to be made on account of the Connecticut Railway and Lighting Company First and Refunding Mortgage 4½% Bonds. ½ of $13,257,000 principal amount of such bonds outstanding		66,285.00	49,713.75
Annual Amounts Payable as cash rentals		726,118.00	544,588.50
		$1,399,418.00**	$1,049,563.50***

*See the Agreements and Subleases of February 28, 1910 and related agreements.

**While the lease provides that subsequent to 1914 the annual rental for the balance of the term shall be the sum of $1,400,000 this rental was reduced to $1,399,418 due to the refunding of the underlying Derby Street Railway Company bonds prior to 1914 at a more favorable rate of interest.

***The Trustees of The New York, New Haven and Hartford Railroad Company, The Connecticut Company and the Connecticut Railway and Lighting Company have previously stipulated that—

"(3) Three-fourths of the amount of stipulated rental for the property covered by the said lease dated December 19, 1906, for the year 1935 amounted to $1,049,563.50." (Par. [3] of Exhibit 1 of Record.)

Copy of Exhibit X-2 of March 13, 1939.

(Mounted Opposite ☛)

Blank Page

STATEMENT REGARDED AMOUNT OF DAMAGES SUSTAINED BY CONNECTICUT RAILWAY AND LIGHTING COMPANY FOR THE FORTY-YEAR PERIOD JANUARY 1, 1936, TO DECEMBER 31, 1975 ON ACCOUNT OF THE RESTRICTION OF THE DECEMBER 19, 1906 LEASE BY THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY AND SUBSEQUENT AGREEMENTS RELATED THERETO

Period used to Calculate Damages		Present value at January 1, 1936, of $1. payable at end of calendar year indicated in Col. 1 - rate of interest - 4%*	Present value as at January 1, 1936 of three-fourths of annual rent payable under 1906 lease ($1,049,563.50), which rent is assumed to be payable at end of each year		Present value as at January 1, 1936 of rental value** which rental value is determined to be available at end of each year		Present value as at January 1, 1936 of three-fourths of annual rent payable under 1906 lease, ($1,049,563.50) less rental value**		Present value as at January 1, 1936 of Federal Income Tax (computed at 14%, minimum rate for 1936) on $738,925.31***	
Number of Years	Calendar Year		For respective years indicated in Col. 1	Accumulated to end of year indicated in Col. 1	For respective years indicated in Col. 1	Accumulated to end of year indicated in Col. 1	For respective years indicated in Col. 1 (Col. 3 minus 5)	Accumulated to end of year indicated in Col. 1 (Col. 4 minus 6)	For respective years indicated in Col. 1	Accumulated to end of year indicated in Col. 1
(1)		(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
1	1936	$0.9615 384 615	$1,009,195.67	$1,009,195.67	$435,372.50	$ 435,372.50	$573,823.17	$ 573,823.17	$ -	$ -
2	1937	0.9245 562 130	970,380.45	1,979,576.13	356,645.33	792,017.83	613,735.12	1,187,558.30	-	-
3	1938	0.8889 963 587	933,058.13	2,912,634.26	291,825.40	1,083,843.23	641,232.73	1,828,791.03	-	-
4	1939	0.8548 041 910	897,171.28	3,809,805.54	378,394.09	1,462,237.32	518,777.19	2,347,568.22	33,275.57	33,275.57
5	1940	0.8219 271 068	862,644.69	4,672,470.23	363,840.48	1,826,077.80	498,824.21	2,846,392.43	31,995.74	65,271.31
6	1941	0.7903 145 257	829,485.28	5,501,955.51	349,846.61	2,175,924.41	479,638.67	3,326,031.10	30,765.13	96,036.44
7	1942	0.7599 178 132	797,582.00	6,299,537.51	336,390.97	2,512,315.38	461,191.03	3,787,222.13	29,581.86	125,618.30
8	1943	0.7306 902 050	766,905.77	7,066,443.28	323,452.86	2,835,768.24	443,452.91	4,230,675.04	28,444.10	154,062.40
9	1944	0.7025 867 356	737,409.39	7,803,852.67	311,012.36	3,146,780.60	426,397.03	4,657,072.07	27,350.09	181,412.49
10	1945	0.6755 641 688	709,047.49	8,512,900.16	299,050.35	3,445,830.95	409,997.14	5,067,069.21	26,298.17	207,710.66
11	1946	0.6495 809 316	681,776.44	9,194,676.60	287,548.41	3,733,379.36	394,228.03	5,461,297.24	25,286.70	232,997.36
12	1947	0.6243 970 496	655,554.27	9,850,230.86	276,488.86	4,009,868.22	379,065.41	5,840,362.64	24,314.13	257,311.49
13	1948	0.6005 740 861	630,340.64	10,480,571.50	265,854.47	4,275,722.69	364,485.97	6,204,848.61	23,378.97	280,690.46
14	1949	0.5774 750 828	606,096.77	11,086,668.27	255,629.49	4,531,352.18	350,467.28	6,555,315.89	22,479.78	303,170.24
15	1950	0.5552 645 027	582,785.35	11,669,453.62	245,797.59	4,777,149.97	336,987.76	6,892,303.65	21,615.18	324,785.42
16	1951	0.5339 081 757	560,370.53	12,229,824.15	236,343.83	5,013,493.80	324,026.70	7,216,330.35	20,783.82	345,569.24
17	1952	0.5133 732 459	538,817.82	12,768,641.97	227,253.69	5,240,747.49	311,564.13	7,527,894.48	19,984.44	365,553.68
18	1953	0.4936 281 210	518,094.06	13,286,736.03	218,513.16	5,459,260.65	299,580.90	7,827,475.38	19,215.81	384,769.49
19	1954	0.4746 424 240	498,167.36	13,784,903.39	210,108.81	5,669,369.46	288,058.55	8,115,533.93	18,476.74	403,246.23
20	1955	0.4563 869 462	479,007.08	14,263,910.47	202,027.70	5,871,397.16	276,979.38	8,392,513.31	17,766.20	421,012.43
21	1956	0.4388 336 021	460,583.73	14,724,494.20	194,257.40	6,065,654.56	266,326.33	8,658,839.64	17,083.79	438,096.22
22	1957	0.4219 553 866	442,868.97	15,167,363.17	186,785.97	6,252,440.53	256,083.00	8,914,922.64	16,425.78	454,522.00
23	1958	0.4057 263 333	425,835.55	15,593,198.72	179,601.89	6,432,042.42	246,233.66	9,161,156.30	15,791.88	470,314.88
24	1959	0.3901 214 743	409,457.26	16,002,655.98	172,694.13	6,604,736.55	236,763.13	9,397,919.43	15,180.54	485,495.42
25	1960	0.3751 168 023	393,708.90	16,396,364.88	166,052.04	6,770,788.59	227,656.86	9,625,576.29	14,592.44	500,087.86
26	1961	0.3606 892 329	378,566.25	16,774,931.13	159,665.43	6,930,454.02	218,900.72	9,844,477.11	14,026.81	514,114.67
27	1962	0.3468 165 701	364,006.01	17,138,937.14	153,524.45	7,083,978.47	210,481.56	10,054,958.67	13,482.77	527,597.44
28	1963	0.3334 774 713	350,005.78	17,488,942.92	147,619.66	7,231,598.13	202,386.12	10,257,344.79	12,961.51	540,558.95
29	1964	0.3206 514 147	336,543.02	17,825,485.94	141,941.98	7,373,540.11	194,601.04	10,451,945.83	12,462.93	553,109.38
30	1965	0.3083 186 680	323,600.02	18,149,085.96	136,482.68	7,510,022.79	187,117.34	10,639,064.17	12,982.14	566,111.52
31	1966	0.2964 602 577	311,153.87	18,460,240.83	131,233.34	7,641,256.13	179,920.53	10,818,984.70	11,540.32	576,481.84
32	1967	0.2850 579 401	299,186.41	18,759,427.24	126,185.91	7,767,442.04	173,000.04	10,991,984.20	11,096.45	587,748.49
33	1968	0.2740 941 731	287,679.24	19,047,106.48	121,332.60	7,888,774.64	166,346.64	11,158,331.84	10,669.86	598,418.35
34	1969	0.2635 520 896	276,614.65	19,323,721.13	116,665.96	8,005,440.60	159,948.69	11,318,280.53	10,259.48	608,677.83
35	1970	0.2534 154 707	265,975.43	19,589,696.76	112,178.81	8,117,619.41	153,796.62	11,472,077.15	9,864.89	618,542.71
36	1971	0.2436 687 219	255,745.80	19,845,442.56	107,864.24	8,225,483.65	147,881.56	11,619,958.71	9,485.47	628,028.18
37	1972	0.2342 968 479	245,909.42	20,091,351.98	103,715.62	8,329,199.27	142,193.80	11,762,152.71	9,120.44	637,148.62
38	1973	0.2252 854 307	236,451.37	20,327,803.35	99,726.55	8,428,925.82	136,724.82	11,898,877.53	8,769.68	645,918.47
39	1974	0.2166 206 064	227,357.08	20,555,160.43	95,890.92	8,524,816.74	131,466.16	12,030,343.69	8,432.51	654,350.81
40	1975	0.2082 890 447	218,612.58	20,773,773.01	92,202.81	8,617,019.55	126,409.77	12,156,753.46	8,108.68	662,459.43
			$20,773,773.91	$20,773,773.01	$8,617,019.55	$8,617,019.55	$12,156,753.46	$12,156,753.46	$662,459.43	$662,459.43
		Brought forward from Col. 10						662,459.43		
		Amount of damages sustained for the forty-year period January 1, 1936, to December 31, 1975						$12,819,212.89		

664 *Copy of Exhibit X-2 of March 13, 1939.*

Statement Regarding Amount of Damages Sustained by Connecticut Railway and Lighting Company for the Forty-Year Period January 1, 1936, to December 31, 1975 on Account of the Rejection of the December 19, 1906 Lease by The New York, New Haven and Hartford Railroad Company and Subsequent Agreements Related Thereto.

*This and other ten place interest and annuity tables are set forth in Tables in Kent's Mathematical Principles of Finance (2nd Ed.) 1927.

665 **The annual rental value for the years 1936-1938, inclusive, has been calculated as follows:

There has been added to the net income derived from the transportation properties of Connecticut Railway and Lighting Company for those years, namely, $246,045.34, $179,005.53 and $121,521.83, respectively, the annual earning power, of three fourths of the contents of the sinking fund referred to in the 1906 lease as at October 23, 1935, namely $157,028.31, and three-fourths of the annual payments required to be made to such sinking fund, namely $49,713.75.

666 Thus the annual rental value for the years 1936-1938, inclusive, is $452,787.40, $385,747.59, and $328,263.89, respectively.

The annual rental value for the years 1939-1975, inclusive, has been calculated as follows:

There has been added to the operating income before Federal income taxes of the transportation properties of Connecticut Railway and Lighting Company for an estimated normal year, namely $235,925.51, the annual earning power, of three-fourths of the contents of the sinking fund referred to in the 1906 lease as at October 23, 1935,

Copy of Exhibit X-2 of March 13, 1939.

667

namely $157,028.31, and three-fourths of the annual payments required to be made to such sinking fund, namely $49,713.75.

Thus the annual rental value for the years 1939-1975, inclusive, is $442,667.57.

***$235,925.51 is the estimated normal operating income before Federal income taxes of the transportation properties of Connecticut Railway and Lighting Company.

668

669

670

Copy of Exhibit X-2A of March 15, 1939.

671

(Mounted Opposite ☛)

672

Blank Page

STATEMENT REGARDING AMOUNT OF DAMAGES SUSTAINED BY CONNECTICUT RAILWAY AND LIGHTING COMPANY FOR THE FORTY-YEAR PERIOD JANUARY 1, 1936, TO DECEMBER 31, 1975 ON ACCOUNT OF THE REDUCTION OF THE DECEMBER 19, 1906 LEASE BY THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY AND SUBSEQUENT AGREEMENTS RELATED THERETO

Period used to Calculate Damages		Present value at January 1, 1936, of $1. payable at end of calendar year indicated in Col. 1 - rate of interest - 4%*	Present value as at January 1, 1936 of three-fourths of annual rent payable under 1906 lease, ($1,049,563.50), which rent is assumed to be payable at end of each year		Present value as at January 1, 1936 of rental value** which rental value is determined to be available at end of each year		Present value as at January 1, 1936 of three-fourths of annual rent payable under 1906 lease, ($1,049,563.50) less rental value**		Present value as at January 1, 1936 of Federal Income Tax (computed at 16%, minimum rate for 1938) on $865,537.67***	
Number of Years	Calendar Year		For respective years indicated in Col. 1	Accumulated to end of year indicated in Col. 1	For respective years indicated in Col. 1	Accumulated to end of year indicated in Col. 1	For respective years indicated in Col. 1 (Col. 3 minus 5)	Accumulated to end of year indicated in Col. 1 (Col. 4 minus 6)	For respective years indicated in Col. 1	Accumulated to end of year indicated in Col. 1
(1)		(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
1	1936	$0.9615 384 615	$1,009,195.67	$1,009,195.67	$ 435,372.50	$ 435,372.50	$ 573,823.17	$ 573,823.17	$ -	$ -
2	1937	0.9245 562 130	970,380.45	1,979,576.12	356,645.33	792,017.83	613,735.12	1,187,558.29	-	-
3	1938	0.8889 963 587	933,058.13	2,912,634.25	291,885.40	1,083,843.23	641,832.73	1,828,791.02	-	-
4	1939	0.8548 041 910	897,171.88	3,809,805.53	318,286.87	1,402,069.50	578,945.01	2,407,736.03	$5,347.88	$5,347.88
5	1940	0.8219 271 068	862,664.69	4,672,470.22	305,986.80	1,708,056.30	556,677.89	2,964,413.92	88,449.89	93,797.77
6	1941	0.7903 145 257	829,485.28	5,501,955.50	294,218.09	2,002,274.39	535,267.19	3,499,681.11	21,566.43	67,364.20
7	1942	0.7599 178 132	797,582.00	6,299,537.50	282,902.00	2,285,176.39	514,680.00	4,014,361.11	20,776.19	88,140.39
8	1943	0.7306 902 050	766,905.77	7,066,443.27	272,021.15	2,557,197.54	494,884.62	4,509,245.73	19,937.87	108,078.26
9	1944	0.7025 867 356	737,409.39	7,803,852.66	261,558.80	2,818,756.34	475,850.59	4,985,096.32	19,150.26	127,228.52
10	1945	0.6755 641 688	709,047.49	8,512,900.15	251,498.85	3,070,255.19	457,548.64	5,442,644.96	18,452.17	145,740.69
11	1946	0.6495 809 316	681,776.44	9,194,676.59	241,825.81	3,312,081.00	439,950.63	5,882,595.59	17,748.47	163,489.16
12	1947	0.6245 970 496	655,554.87	9,850,230.86	232,524.22	3,544,605.22	423,089.45	6,305,685.04	17,060.07	180,549.23
13	1948	0.6005 740 861	630,340.64	10,480,571.50	223,581.56	3,768,187.38	406,759.08	6,712,384.12	16,403.91	196,947.14
14	1949	0.5774 750 828	606,096.77	11,086,668.27	214,982.87	3,983,169.65	391,114.90	7,103,498.62	15,772.99	212,720.13
15	1950	0.5552 645 027	582,785.35	11,669,453.62	206,713.78	4,189,883.37	376,071.63	7,479,570.25	15,166.34	227,886.47
16	1951	0.5339 081 757	560,370.53	12,229,824.15	198,763.19	4,388,646.56	361,607.34	7,841,177.59	14,583.08	242,469.55
17	1952	0.5133 732 459	538,817.88	12,768,641.97	191,118.45	4,579,765.01	347,699.37	8,188,876.96	14,022.13	256,491.68
18	1953	0.4936 281 210	518,094.06	13,286,736.03	183,767.74	4,763,532.75	334,326.32	8,523,203.28	13,482.82	269,974.44
19	1954	0.4746 424 240	498,167.36	13,784,903.39	176,699.75	4,940,232.50	321,467.61	8,844,670.89	12,964.25	282,938.69
20	1955	0.4563 869 462	479,007.08	14,263,910.47	169,903.61	5,110,136.11	309,103.47	9,153,774.36	12,465.63	295,404.32
21	1956	0.4388 336 021	460,583.73	14,724,494.20	163,368.85	5,273,504.96	297,214.88	9,450,989.24	11,986.18	307,390.50
22	1957	0.4219 553 866	442,868.97	15,167,363.17	157,085.44	5,430,590.40	285,783.53	9,736,772.77	11,525.17	318,915.67
23	1958	0.4057 263 333	425,835.55	15,593,198.72	151,043.69	5,581,634.09	274,791.86	10,011,564.63	11,081.90	329,997.57
24	1959	0.3901 214 743	409,457.86	16,002,656.58	145,234.32	5,726,868.41	264,223.54	10,275,787.97	10,655.67	340,653.24
25	1960	0.3751 168 023	393,708.90	16,396,364.88	139,648.38	5,866,516.79	254,060.52	10,529,848.09	10,245.84	350,899.08
26	1961	0.3606 892 329	378,566.85	16,774,931.13	134,277.89	6,000,794.08	244,288.96	10,774,137.05	9,851.76	360,750.84
27	1962	0.3468 165 701	364,006.01	17,138,937.14	129,113.78	6,129,906.86	234,893.23	11,009,030.28	9,472.57	370,223.41
28	1963	0.3334 774 713	350,005.78	17,488,942.92*	124,146.90	6,254,053.76	225,858.88	11,234,889.16	9,108.51	379,331.92
29	1964	0.3206 514 147	336,544.02	17,825,486.94	119,372.02	6,373,425.78	217,172.00	11,452,061.16	8,758.18	388,090.10
30	1965	0.3083 186 680	323,600.02	18,149,086.96	114,780.79	6,488,206.57	208,819.23	11,660,880.39	8,421.33	396,511.43
31	1966	0.2964 602 577	311,153.87	18,460,240.83	110,366.14	6,598,572.71	200,787.73	11,861,668.12	8,097.43	404,608.86
32	1967	0.2850 579 401	299,186.41	18,759,427.24	106,121.89	6,704,694.60	193,065.12	12,054,733.24	7,786.99	412,395.85
33	1968	0.2740 941 731	287,679.24	19,047,106.48	102,039.70	6,806,733.70	185,639.54	12,240,372.78	7,488.53	419,884.38
34	1969	0.2635 520 896	276,614.65	19,323,721.13	98,115.10	6,904,848.80	178,499.55	12,418,872.33	7,202.59	427,086.97
35	1970	0.2534 154 707	265,975.63	19,589,696.76	94,341.44	6,999,190.24	171,634.19	12,590,506.52	6,927.78	434,014.75
36	1971	0.2436 687 219	255,745.80	19,845,442.56	90,712.93	7,089,903.17	165,032.87	12,755,539.39	6,663.70	440,678.45
37	1972	0.2342 968 479	245,909.42	20,091,351.98	87,223.97	7,177,127.14	158,685.45	12,914,224.84	6,409.12	447,087.57
38	1973	0.2252 854 307	236,451.37	20,327,803.35	83,869.80	7,260,996.34	152,581.57	13,066,807.01	6,163.80	453,251.37
39	1974	0.2166 206 064	227,357.08	20,555,160.43	80,643.46	7,341,639.80	146,713.62	13,213,520.63	5,927.51	459,178.88
40	1975	0.2082 890 447	218,612.58	20,773,773.01	77,541.79	7,419,181.59	141,070.79	13,354,591.42	5,699.15	464,878.03
			$20,773,773.01	$20,773,773.01	$7,419,181.59	$7,419,181.59	$13,354,591.42	$13,354,591.42	$464,878.03	$464,878.03
		Brought forward from Col. 10						464,878.03		
		Amount of damages sustained for the forty-year period January 1, 1936, to December 31, 1975						$13,819,407.63		

(See Notes on attached sheet.)

676 *Copy of Exhibit X-2A of March 15, 1939.*

Statement Regarding Amount of Damages Sustained by Connecticut Railway and Lighting Company for the Forty-Year Period January 1, 1936, to December 31, 1975 on Account of the Rejection of the December 19, 1906 Lease by The New York, New Haven and Hartford Railroad Company and Subsequent Agreements Related Thereto.

*This and other ten place interest and annuity tables are set forth in Tables in Kent's Mathematical Principles of Finance (2nd Ed.) 1927.

677 **The annual rental value for the years 1936-1938, inclusive, has been calculated as follows:

There has been added to the net income derived from the transportation properties of Connecticut Railway and Lighting Company for those years, namely, $246,045.34, $179,005.53 and $121,521.83, respectively, the annual earning power, of three-fourths of the contents of the sinking fund referred to in the 1906 lease as at October 23, 1935, namely, $157,028.31, and three-fourths of the annual payments required to be made to such sinking fund, namely, $49,713.75.

678 Thus the annual rental value for the years 1936-1938, inclusive, used in the calculations on the attached statement, is $452,787.40, $385,747.59, and $328,263.89, respectively.

The annual rental value for the years 1939-1975, inclusive, has been calculated as follows:

There has been added to the operating income before Federal income taxes of the transportation properties of Connecticut Railway and Lighting Company for an estimated normal year, namely, $165,537.67, (such normal year has been obtained by averaging the operating income before Federal income taxes of the transportation properties of

Copy of Exhibit X-2A of March 15, 1939.

679

Connecticut Railway and Lighting Company for the last half of the calendar year 1937 and the calendar year 1938, as shown on Exhibit X-4, a period of all bus operation), the annual earning power, of three-fourths of the contents of the sinking fund referred to in the 1906 lease as at October 3, 1935, namely, $157,028.31, and three-fourths of the annual payments required to be made to such sinking fund, namely, $49,713.75.

Thus the annual rental value for the years 1939-1975, inclusive, used in the calculations on the attached statement, is $372,279.73.

680

***$165,537.67 is the estimated normal operating income before Federal income taxes of the transportation properties of Connecticut Railway and Lighting Company.

681

682 **Copy of Exhibit X-2AA of March 15, 1939:**

Statement Showing Net Operating Income Before Federal Income Taxes of Connecticut Railway and Lighting Company Transportation Properties for the Last Half of the Calendar Year 1937 and For the Calendar Year 1938 and Such Income for the Average or Normal Year During Such Period.

Year	Net Operating Income before Fed. Inc. Taxes
683 July 1, 1937 to Dec. 31, 1937	$102,771.38*
1938	145,535.13*

Average or normal year during such period $165,537.67

*These figures have been taken from Exhibit X-4.

Copy of Exhibit X-2B of March 15, 1939.

684

(Mounted Opposite ☛)

Blank Page

STATEMENT SHOWING AMOUNT OF DAMAGES SUSTAINED BY CONNECTICUT RAILWAY AND LIGHTING COMPANY FOR THE FORTY-YEAR PERIOD JANUARY 1, 1936, TO DECEMBER 31, 1975 [illegible] AND PAID BY THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY AND THE [illegible] AGREEMENT RELATING THERETO

Period used to Calculate Damages		Present value at January 1, 1936, of $1, payable at end of calendar year indicated in Col. 1 - rate of interest 4 ½%	Present value as at January 1, 1936 of three-fourths of annual rent payable under 1906 lease ($1,049,963.50), which rent is assumed to be payable at end of each year		Present value as at January 1, 1936 of rental value** which rental value is determined to be available at end of each year		Present value as at January 1, 1936 of three-fourths of annual rent payable under 1906 lease, ($1,049,963.50) less rental value**		Present value as at January 1, 1936 of Federal Income Tax (computed at 16%, minimum rate not apply) on $262,490.87*	
Number of Years	Calendar Year		For respective years indicated in Col. 1	Accumulated to end of year indicated in Col. 1	For respective years indicated in Col. 1	Accumulated to end of year indicated in Col. 1	For respective years indicated in Col. 1 (Col. 3 minus 5)	Accumulated to end of year indicated in Col. 1 (Col. 4 minus 6)	For respective years indicated in Col. 1	Accumulated to end of year indicated in Col. 1
(1)		(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
1	1936	0.9615 384 615	$1,009,193.67	$1,009,193.67	$ 433,378.50	$ 433,378.50	$ 575,815.17	$ 575,815.17	$ -	$ -
2	1937	0.9246 668 130	970,380.43	1,979,574.10	332,617.83	765,996.33	637,762.60	1,213,577.77	-	-
3	1938	0.8889 963 707	933,058.13	2,912,634.23	291,825.40	1,057,821.73	641,232.73	1,854,812.50	-	-
4	1939	0.8548 041 910	897,171.26	3,809,805.49	340,735.89	1,398,557.62	556,435.37	2,411,247.87	87,661.87	87,661.87
5	1940	0.8219 271 068	862,684.69	4,672,490.18	387,630.09	1,786,187.71	475,054.60	2,886,302.47	76,021.05	163,682.92
6	1941	0.7903 145 257	829,485.88	5,501,976.06	319,088.93	2,105,276.64	510,396.95	3,396,699.42	81,663.51	245,346.43
7	1942	0.7599 178 132	797,502.00	6,299,478.06	308,912.44	2,414,189.08	488,589.56	3,885,289.00	78,174.33	323,520.76
8	1943	0.7306 902 050	766,709.77	7,066,187.83	291,861.96	2,706,051.04	474,847.81	4,360,136.81	75,975.65	399,496.41
9	1944	0.7025 867 356	737,085.33	7,803,273.16	280,099.57	2,986,150.61	457,585.76	4,817,722.57	73,213.72	472,710.13
10	1945	0.6755 641 688	709,047.49	8,512,320.65	269,888.03	3,256,038.64	439,159.46	5,256,882.03	70,265.51	542,975.64
11	1946	0.6495 809 316	681,776.44	9,194,097.09	258,930.82	3,514,969.46	422,845.62	5,679,727.65	67,655.62	610,631.26
12	1947	0.6245 970 495	655,554.27	9,849,651.36	248,971.94	3,763,941.40	406,582.33	6,086,309.98	65,053.17	675,684.43
13	1948	0.6005 740 861	630,340.64	10,479,992.00	239,196.10	4,003,137.50	391,144.54	6,477,454.52	62,583.27	738,267.70
14	1949	0.5774 750 828	606,096.77	11,086,088.77	230,188.96	4,233,326.46	375,907.81	6,853,362.33	60,145.25	798,412.95
15	1950	0.5552 649 067	582,795.35	11,668,883.62	221,335.15	4,454,661.61	361,460.20	7,214,822.53	57,833.63	856,246.58
16	1951	0.5339 081 757	560,370.53	12,229,254.15	212,822.26	4,667,483.87	347,548.27	7,562,370.80	55,607.72	911,854.30
17	1952	0.5133 732 459	538,817.88	12,768,072.03	204,636.73	4,872,120.60	334,181.15	7,896,551.95	53,469.18	965,323.48
18	1953	0.4935 321 210	518,094.66	13,286,736.69	196,766.14	5,068,886.74	321,328.52	8,217,880.47	51,405.36	1,016,728.84
19	1954	0.4746 464 240	498,167.36	13,784,903.39	189,198.21	5,258,084.95	308,969.15	8,526,849.62	49,435.06	1,066,163.90
20	1955	0.4563 849 461	479,007.88	14,263,911.07	181,921.36	5,440,006.31	297,086.52	8,823,936.14	47,533.86	1,113,697.76
21	1956	0.4388 336 982	460,583.73	14,724,494.80	174,904.38	5,614,910.69	285,679.35	9,109,615.49	45,708.71	1,159,406.47
22	1957	0.4219 553 444	442,866.97	15,167,361.77	168,196.58	5,783,107.27	274,670.39	9,384,285.88	44,027.11	1,203,433.58
23	1958	0.4057 353 333	425,833.72	15,593,195.49	161,727.45	5,944,834.72	264,106.28	9,648,392.16	42,344.93	1,245,778.51
24	1959	0.3901 314 743	409,457.42	16,002,652.91	155,507.14	6,100,341.86	253,950.28	9,902,342.44	40,712.05	1,286,490.56
25	1960	0.3751 264 083	393,700.90	16,396,353.80	149,526.10	6,249,867.96	244,174.80	10,146,517.24	39,147.97	1,325,638.53
26	1961	0.3606 488 399	378,566.25	16,774,920.13	143,775.09	6,393,643.05	234,791.16	10,381,308.40	37,646.58	1,363,285.11
27	1962	0.3466 815 768	364,006.01	17,138,926.14	138,245.08	6,531,888.13	225,760.93	10,607,069.33	36,193.71	1,399,478.82
28	1963	0.3331 554 623	349,993.78	17,488,919.92	132,928.16	6,664,816.29	217,065.62	10,824,134.95	34,810.50	1,434,289.32
29	1964	0.3201 514 157	336,502.58	17,825,422.50	127,815.53	6,792,631.82	208,686.99	11,032,821.94	33,469.92	1,467,759.24
30	1965	0.3076 456 688	323,506.88	18,148,929.38	122,898.55	6,915,530.37	200,608.47	11,233,430.41	32,177.35	1,499,936.59
31	1966	0.2956 401 777	311,153.27	18,460,082.65	118,172.15	7,033,702.52	192,981.12	11,426,411.53	30,956.18	1,530,892.77
32	1967	0.2840 770 411	299,206.41	18,759,289.06	113,627.54	7,147,330.06	185,578.87	11,611,990.40	29,764.62	1,560,657.39
33	1968	0.2729 587 511	287,677.24	19,046,966.30	109,257.83	7,256,587.89	178,419.41	11,790,409.81	28,612.71	1,589,270.10
34	1969	0.2623 380 296	276,544.63	19,323,510.93	105,053.03	7,361,640.92	171,491.60	11,961,901.41	27,503.42	1,616,773.52
35	1970	0.2521 534 747	265,775.43	19,589,286.36	101,012.47	7,462,653.39	164,762.96	12,126,664.37	26,424.47	1,643,197.99
36	1971	0.2423 687 819	255,370.00	19,845,446.36	97,129.30	7,559,782.69	158,240.70	12,284,905.07	25,379.31	1,668,577.30
37	1972	0.2329 503 672	245,308.62	20,090,754.98	93,393.56	7,653,176.25	151,915.06	12,436,820.13	24,367.01	1,692,944.31
38	1973	0.2238 964 277	235,581.37	20,326,336.35	89,801.50	7,742,977.75	145,779.87	12,582,600.00	23,388.51	1,716,332.82
39	1974	0.2151 888 820	226,178.11	20,552,514.46	86,347.79	7,829,325.54	139,830.32	12,722,430.32	22,442.77	1,738,775.59
40	1975	0.2068 950 789	217,089.28	20,769,603.74	83,028.53	7,912,354.07	134,060.75	12,856,491.07	21,529.80	1,760,305.39
			$20,769,603.74	$20,769,603.74	$7,912,354.07	$7,912,354.07	$12,856,491.07	$12,856,491.07	$338,735.32	$338,735.32
		Brought forward from Col. 10						139,778.52		
		Amount of damages sustained for the forty-year period January 1, 1936, to December 31, 1975						$13,445,830.82		

(See Notes on attached sheet.)

688 *Copy of Exhibit X-2B of March 15, 1939.*

Statement Regarding Amount of Damages Sustained by Connecticut Railway and Lighting Company for the Forty-Year Period January 1, 1936, to December 31, 1975 on Account of the Rejection of the December 19, 1906 Lease by The New York, New Haven and Hartford Railroad Company and Subsequent Agreements Related Thereto.

*This and other ten place interest and annuity tables are set forth in Tables in Kent's Mathematical Principles of
689 Finance (2nd Ed.) 1927.

**The annual rental value for the years 1936-1938, inclusive, has been calculated as follows:

There has been added to the net income derived from the transportation properties of Connecticut Railway and Lighting Company for those years, namely, $246,045.34, $179,005.53 and $121,521.83, respectively, the annual earning power, of three-fourths of the contents of the sinking fund referred to in the 1906 lease as at October 23, 1935, namely, $157,028.31, and three-fourths of the annual payments required to be made to such sinking fund, namely, $49,713.75.

690 Thus the annual rental value for the years 1936-1938, inclusive, used in the calculations on the attached statement, is $452,787.40, $385,747.59, and $328,263.89, respectively.

The annual rental value for the years 1939-1975, inclusive, has been calculated as follows:

There has been added to the operating income before Federal income taxes of the transportation properties of Connecticut Railway and Lighting Company for an estimated normal year, namely, $191,870.04 (such normal year has been obtained by averaging the operating income before Federal income taxes of the transportation properties of Connecticut Railway and Lighting Company for the years 1936-1938, inclusive, as shown on Exhibit X-4), the annual

Copy of Exhibit X-2BB of March 15, 1939. 691

earning power, of three-fourths of the contents of the sinking fund referred to in the 1906 lease as at October 23, 1935, namely, $157,028.31, and three-fourths of the annual payments required to be made to such sinking fund, namely, $49,713.75.

Thus the annual rental value for the years 1939-1975, inclusive, used in the calculations on the attached statement, is $398,612.10.

***$191,870.04 is the estimated normal operating income before Federal income taxes of the transportation properties of Connecticut Railway and Lighting Company. 692

Copy of Exhibit X-2BB of March 15, 1939.

Statement Showing Net Operating Income Before Federal Income Taxes of Connecticut Railway and Lighting Company Transportation Properties for the Years 1936-1938, Inclusive, and Such Income for the Average or Normal Year During Such Period.

693

Year	Net Operating Income before Fed. Inc. Taxes
1936	$251,069.45*
1937	179,005.53*
1938	145,535.13*

Average or normal year during such period $191,870.04

*These figures have been taken from Exhibit X-4.

694

695

Copy of Exhibit X-2C of March 15, 1939.

(Mounted Opposite ☛)

696

Blank Page

STATEMENT REGARDING AMOUNT OF DAMAGES SUSTAINED BY CONNECTICUT RAILWAY AND LIGHTING COMPANY FOR THE FORTY-YEAR PERIOD JANUARY 1, 1936, to DECEMBER 31, 1975 ON ACCOUNT OF THE ENFORCED USE OF THE PROPERTIES IN 1906 LEASE BY THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY AND SUBSEQUENT AGREEMENTS FOR THE SAME*

Period used to Calculate Formula		Present value as at January 1, 1936, of $1. payable at end of calendar year indicated in Col. 1 - rate of interest - 4%*	Present value as at January 1, 1936 of three-fourths of annual rent payable under 1906 lease, ($1,069,563.50), which rent is assumed to be payable at end of each year		Present value as at January 1, 1936 of rental value** which rental value is determined to be available at end of each year		Present value as at January 1, 1936 of three-fourths of annual rent payable under 1906 lease ($1,069,563.50) less rental value**		Present value as at January 1, 1936 of Federal Income Tax (computed at 16%, minimum rate for 1975) on $388,749***	
Number of Years	Calendar Year		For respective years indicated in Col. 1	Accumulated to end of year indicated in Col. 1	For respective years indicated in Col. 1	Accumulated to end of year indicated in Col. 1	For respective years indicated in Col. 1 (Col. 3 minus 5)	Accumulated to end of year indicated in Col. 1 (Col. 4 minus 6)	For respective years indicated in Col. 1	Accumulated to end of year indicated in Col. 1
(1)		(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
1	1936	0.9615 384 615	$1,069,195.47	$1,069,195.47	$435,372.50	$ 435,372.50	633,823.17	$ 633,823.17	$ -	$ -
2	1937	0.9245 562 130	970,380.45	1,979,576.12	356,645.33	792,017.83	613,735.12	1,187,558.29	-	-
3	1938	0.8889 963 587	933,098.13	2,912,674.25	291,825.40	1,083,843.23	641,272.73	1,828,791.02	-	-
4	1939	0.8548 041 910	897,171.28	3,809,845.53	434,660.24	1,518,503.47	462,511.04	2,291,302.06	42,559.83	42,559.83
5	1940	0.8219 271 068	862,644.69	4,672,470.22	417,942.54	1,936,446.01	444,722.15	2,736,024.21	40,922.93	83,482.76
6	1941	0.7903 148 257	829,485.28	5,501,955.50	401,867.82	2,338,313.83	427,617.46	3,163,641.67	39,318.97	122,801.73
7	1942	0.7599 178 132	797,582.00	6,299,537.50	386,411.37	2,724,725.20	411,170.63	3,574,812.30	37,835.35	160,637.08
8	1943	0.7306 902 050	766,905.77	7,066,443.27	371,549.39	3,096,274.59	395,356.38	3,970,168.68	36,364.	197,001.43
9	1944	0.7025 867 356	737,409.39	7,803,852.66	357,259.03	3,453,533.62	380,150.36	4,350,319.04	34,981.07	232,020.72
10	1945	0.6755 641 688	709,047.49	8,512,900.15	343,518.30	3,797,051.92	365,529.19	4,715,848.23	33,635.66	265,656.38
11	1946	0.6495 809 316	681,776.44	9,194,676.59	330,306.06	4,127,357.98	351,470.38	5,067,318.61	32,341.98	298,006.36
12	1947	0.6245 970 496	655,554.27	9,850,230.86	317,601.98	4,444,959.96	337,952.29	5,405,270.90	31,098.86	329,105.22
13	1948	0.6005 740 861	630,340.64	10,480,571.50	305,386.52	4,750,346.48	324,954.12	5,730,225.02	29,901.98	359,006.20
14	1949	0.5774 750 828	606,096.77	11,086,668.27	293,640.88	5,043,987.36	312,455.89	6,042,680.91	28,751.91	387,758.11
15	1950	0.5552 645 027	582,785.35	11,669,453.62	282,347.00	5,326,334.36	300,438.35	6,343,119.26	27,646.86	415,404.97
16	1951	0.5339 081 757	560,379.53	12,229,834.15	271,487.50	5,597,821.86	288,883.03	6,632,002.29	26,582.75	441,987.72
17	1952	0.5133 732 459	538,837.82	12,768,671.97	261,045.68	5,858,867.54	277,772.14	6,909,774.43	25,560.34	467,548.06
18	1953	0.4936 281 210	518,094.06	13,286,736.03	251,005.46	6,109,873.00	267,088.60	7,176,863.03	24,577.25	492,124.71
19	1954	0.4746 424 240	498,167.36	13,784,903.39	241,351.40	6,351,224.40	256,815.96	7,433,678.99	23,631.97	515,756.68
20	1955	0.4563 869 462	479,007.08	14,263,910.47	232,068.65	6,583,293.05	246,938.43	7,680,617.42	22,723.05	538,479.73
21	1956	0.4388 336 021	460,583.73	14,724,494.20	223,142.94	6,806,435.99	237,440.79	7,918,058.21	21,849.89	560,329.62
22	1957	0.4219 553 866	442,868.97	15,167,363.17	214,560.52	7,020,996.51	228,308.45	8,146,366.66	21,008.74	581,337.36
23	1958	0.4057 263 333	425,835.55	15,593,198.72	206,308.19	7,227,304.70	219,527.36	8,365,894.02	20,198.71	601,536.07
24	1959	0.3901 214 743	409,457.46	16,002,655.98	198,373.26	7,425,677.96	211,084.20	8,576,978.22	19,419.76	620,955.83
25	1960	0.3751 168 983	393,708.90	16,396,364.88	190,743.52	7,616,421.48	202,965.38	8,779,943.60	18,670.89	639,626.72
26	1961	0.3606 892 329	378,566.25	16,774,931.13	183,407.23	7,799,828.71	195,159.02	8,975,102.62	17,950.26	657,576.98
27	1962	0.3468 165 701	364,006.01	17,138,937.14	176,353.10	7,976,181.81	187,652.91	9,162,755.53	17,257.65	674,834.63
28	1963	0.3334 774 713	350,005.78	17,488,942.92	169,570.29	8,145,752.10	180,435.49	9,343,190.02	16,589.51	691,424.14
29	1964	0.3206 514 147	336,544.02	17,825,486.94	163,048.36	8,308,800.46	173,495.66	9,516,685.68	15,944.91	707,433.15
30	1965	0.3083 186 680	323,600.02	18,149,086.96	156,777.27	8,465,577.73	166,822.75	9,683,509.23	15,324.88	722,758.03
31	1966	0.2964 602 577	311,153.87	18,460,240.83	150,747.37	8,616,325.10	160,406.50	9,843,915.73	14,728.46	737,486.49
32	1967	0.2850 579 401	299,186.41	18,759,427.24	144,949.40	8,761,274.50	154,237.01	9,998,152.74	14,155.75	751,737.24
33	1968	0.2740 941 731	287,679.24	19,047,106.48	139,374.42	8,900,648.92	148,304.82	10,146,457.56	13,606.87	765,344.11
34	1969	0.2635 520 896	276,614.46	19,323,721.13	134,013.87	9,034,662.79	142,600.58	10,289,058.14	13,081.99	778,506.10
35	1970	0.2534 154 707	265,975.43	19,589,696.76	128,859.49	9,163,522.28	137,116.14	10,426,174.48	12,577.38	791,183.48
36	1971	0.2436 687 219	255,745.60	19,845,442.56	123,903.35	9,287,425.63	131,842.45	10,558,016.93	12,092.62	803,276.10
37	1972	0.2342 968 479	245,909.42	20,091,351.98	119,137.84	9,406,563.47	126,771.58	10,684,788.51	11,627.41	814,903.51
38	1973	0.2252 854 307	236,451.37	20,327,803.35	114,555.61	9,521,119.08	121,895.76	10,806,684.27	11,180.74	826,084.25
39	1974	0.2166 205 064	227,357.08	20,555,160.43	110,149.63	9,631,268.71	117,207.45	10,923,891.72	10,753.32	836,837.57
40	1975	0.2082 890 447	218,613.58	20,773,774.01	105,913.10	9,737,181.81	112,699.48	11,036,591.20	10,340.50	847,178.07
			$20,773,774.01	$20,773,774.01	$9,737,181.81	$9,737,181.81	$11,036,591.20	$11,036,591.20	$847,178.07	$847,178.07
		Brought forward from Col. 10						847,178.07		
		Amount of damages sustained for the forty-year period January 1, 1936, to December 31, 1975						$11,883,884.59		

(See Notes on attached sheet.)

700 *Copy of Exhibit X-2C of March 15, 1939.*

Statement Regarding Amount of Damages Sustained by Connecticut Railway and Lighting Company for the Forty-Year Period January 1, 1936, to December 31, 1975 on Account of the Rejection of the December 19, 1906 Lease by The New York, New Haven and Hartford Railroad Company and Subsequent Agreements Related Thereto.

*This and other ten place interest and annuity tables are set forth in Tables in Kent's Mathematical Principles of Finance (2nd Ed.) 1927.

701 **The annual rental value for the years 1936-1938, inclusive, has been calculated as follows:

There has been added to the net income derived from the transportation properties of Connecticut Railway and Lighting Company for those years, namely, $246,045.34, $179,005.53 and $121,521.83, respectively, the annual earning power, of three-fourths of the contents of the sinking fund referred to in the 1906 lease as at October 23, 1935, namely, $157,028.31, and three-fourths of the annual payments required to be made to such sinking fund, namely, $49,713.75.

702 Thus the annual rental value for the years 1936-1938, inclusive, used in the calculations on the attached statement, is $452,787.40, $385,747.59, and $328,263.89, respectively.

The annual rental value for the years 1939-1975, inclusive, has been calculated as follows:

There has been added to the operating income before Federal income taxes of the transportation properties of Connecticut Railway and Lighting Company for an estimated normal year, namely, $301,749 (such normal year has been obtained by averaging the operating income before Federal income taxes of the transportation properties of Connecticut Railway and Lighting Company for the years 1929-1938, inclusive, such income for the years 1936-1938, in-

Copy of Exhibit X-2C of March 15, 1939.

703

clusive, having been taken from Exhibit X-4 and such income for the years 1929-1935, inclusive, having been furnished by The New York, New Haven and Hartford Railroad Company.), the annual earning power, of three-fourths of the contents of the sinking fund referred to in the 1906 lease as at October 23, 1935, namely, $157,028.31, and three-fourths of the annual payments required to be made to such sinking fund, namely, $49,713.75.

Thus the annual rental value for the years 1939-1975, inclusive, used in the calculations on the attached statement, is $508,491.

704

***$301,749 is the estimated normal operating income before Federal income taxes of the transportation properties of Connecticut Railway and Lighting Company.

705

706 **Copy of Exhibit X-2CC of March 15, 1939.**

Statement Showing Net Operating Income Before Federal Income Taxes of Connecticut Railway and Lighting Company Transportation Properties for the Years 1929-1938, Inclusive, and Such Income for the Average or Normal Year During Such Period.

Year	Net Operating Income before Fed. Inc. Taxes
1929	$697,647**
707 1930	670,682**
1931	504,246**
1932	78,085**
1933	168,362**
1934	106,311**
1935	216,548**
1936	251,069*
1937	179,005*
1938	145,535*
Average or normal year during such period	$301,749

708

**These figures supplied by the Accounting Department of The New York, New Haven & Hartford Railroad Co.

*These figures have been taken from Exhibit X-4.

Copy of Exhibit X-2D of March 15, 1939.

(Mounted Opposite ☛)

Blank Page

STATEMENT REGARDING AMOUNT OF DAMAGES SUSTAINED BY CONNECTICUT RAILWAY AND LIGHTING COMPANY FOR THE FORTY-YEAR PERIOD JANUARY 1, 1936, to DECEMBER 31, 1975 ON ACCOUNT OF THE EXECUTION OF THE DECEMBER 19, 1906 LEASE BY THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY AND SUBSEQUENT AGREEMENTS RELATED THERETO

Period used to Calculate Damages: Number of Years	Calendar Year	Present value at January 1, 1936, of $1. payable at end of calendar year indicated in Col. 1 - rate of interest - 4%*	Present value as at January 1, 1936 of three-fourths of annual rent payable under 1906 lease, ($1,049,563.50), which rent is assumed to be payable at end of each year: For respective years indicated in Col. 1	Present value as at January 1, 1936 of three-fourths of annual rent payable under 1906 lease, ($1,049,563.50), which rent is assumed to be payable at end of each year: Accumulated to end of year indicated in Col. 1	Present value as at January 1, 1936 of rental value** which rental value is determined to be available at end of each year: For respective years indicated in Col. 1	Present value as at January 1, 1936 of rental value** which rental value is determined to be available at end of each year: Accumulated to end of year indicated in Col. 1	Present value as at January 1, 1936 of three-fourths of annual rent payable under 1906 lease ($1,049,563.50) less rental value**: For respective years indicated in Col. 1 (Col. 3 minus 5)	Present value as at January 1, 1936 of three-fourths of annual rent payable under 1906 lease ($1,049,563.50) less rental value**: Accumulated to end of year indicated in Col. 1 (Col. 4 minus 6)	Present value as at January 1, 1936 of Federal Income Tax (computed at 16%, minimum rate for 1936) on $982,809***: For respective years indicated in Col. 1	Present value as at January 1, 1936 of Federal Income Tax (computed at 16%, minimum rate for 1936) on $982,809***: Accumulated to end of year indicated in Col. 1
(1)		(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
1	1936	$0.9615 384 615	$1,009,195.67	$1,009,195.67	$ 435,372.50	$ 435,372.50	$ 573,823.17	$ 573,823.17	$ -	$ -
2	1937	0.9245 562 130	970,380.45	1,979,576.12	356,645.33	792,017.83	613,735.12	1,187,558.29	-	-
3	1938	0.8889 963 587	933,058.13	2,912,634.25	291,825.40	1,083,843.23	641,232.73	1,828,791.02	-	-
4	1939	0.8548 041 910	897,171.28	3,809,805.53	303,950.67	1,387,793.90	593,220.61	2,222,011.63	53,992.00	53,992.00
5	1940	0.8219 271 068	862,664.69	4,672,470.22	484,567.95	2,072,361.85	378,096.74	2,600,108.37	51,915.38	105,907.38
6	1941	0.7903 145 257	829,485.28	5,501,955.50	465,930.72	2,538,292.57	363,554.56	2,963,662.93	49,918.64	155,826.02
7	1942	0.7599 178 132	797,582.00	6,299,537.50	448,010.31	2,986,302.88	349,571.69	3,313,234.62	47,998.69	203,824.71
8	1943	0.7306 902 050	766,905.77	7,066,443.27	430,779.14	3,417,082.02	336,126.63	3,649,361.25	46,152.59	249,977.30
9	1944	0.7025 867 356	737,409.39	7,803,852.66	414,210.71	3,831,292.73	323,198.68	3,972,559.93	44,377.49	294,354.79
10	1945	0.6755 641 688	709,047.49	8,512,900.15	398,279.53	4,229,572.26	310,767.96	4,283,327.89	42,670.66	337,025.45
11	1946	0.6495 809 316	681,776.44	9,194,676.59	382,961.09	4,612,533.35	298,815.35	4,582,143.24	41,029.48	378,054.93
12	1947	0.6245 970 496	655,554.27	9,850,230.86	368,231.82	4,980,765.17	287,322.45	4,869,465.69	39,451.42	417,506.35
13	1948	0.6005 740 861	630,340.64	10,480,571.50	354,069.05	5,334,834.22	276,271.59	5,145,737.28	37,934.06	455,440.41
14	1949	0.5774 750 828	606,096.77	11,086,668.27	340,451.01	5,675,285.23	265,645.76	5,411,383.04	36,475.06	491,915.47
15	1950	0.5552 645 027	582,785.35	11,669,453.62	327,356.74	6,002,641.97	255,428.61	5,666,811.65	35,072.17	526,987.64
16	1951	0.5339 081 757	560,370.53	12,229,824.15	314,766.10	6,317,408.07	245,604.43	5,912,416.08	33,723.24	560,710.88
17	1952	0.5133 732 459	538,817.82	12,768,641.97	302,659.71	6,620,067.78	236,158.11	6,148,574.19	32,426.19	593,137.07
18	1953	0.4936 281 210	518,094.06	13,286,736.03	291,018.95	6,911,086.73	227,075.11	6,375,649.30	31,179.03	624,316.10
19	1954	0.4746 424 240	498,167.36	13,784,903.39	279,825.92	7,190,912.65	218,341.44	6,593,990.74	29,979.84	654,295.94
20	1955	0.4563 869 462	479,007.08	14,263,910.47	269,063.38	7,459,976.03	209,943.70	6,803,934.44	28,826.77	683,122.71
21	1956	0.4388 336 021	460,583.73	14,724,494.20	258,714.79	7,718,690.82	201,868.94	7,005,803.38	27,718.05	710,840.76
22	1957	0.4219 553 866	442,868.97	15,167,363.17	248,764.22	7,967,455.04	194,104.75	7,199,908.13	26,651.97	737,492.73
23	1958	0.4057 263 333	425,835.55	15,593,198.72	239,196.37	8,206,651.41	186,639.18	7,386,547.31	25,626.89	763,119.62
24	1959	0.3901 214 743	409,457.26	16,002,655.98	229,996.51	8,436,647.92	179,460.75	7,566,008.06	24,641.24	787,760.86
25	1960	0.3751 168 023	393,708.90	16,396,364.88	221,150.49	8,657,798.41	172,558.41	7,738,566.47	23,693.30	811,454.16
26	1961	0.3606 892 329	378,566.25	16,774,931.13	212,644.70	8,870,443.11	165,921.55	7,904,488.02	22,782.21	834,236.37
27	1962	0.3468 165 701	364,006.01	17,138,937.14	204,466.06	9,074,909.17	159,539.95	8,064,027.97	21,905.98	856,142.35
28	1963	0.3334 774 713	350,005.78	17,488,942.92	196,601.98	9,271,511.15	153,403.80	8,217,431.77	21,063.44	877,205.79
29	1964	0.3206 514 147	336,544.02	17,825,486.94	189,040.36	9,460,551.51	147,503.66	8,364,935.43	20,253.31	897,459.10
30	1965	0.3083 186 680	323,600.02	18,149,086.96	181,769.58	9,642,321.09	141,830.44	8,506,765.87	19,474.33	916,933.43
31	1966	0.2964 602 577	311,153.87	18,460,240.83	174,778.44	9,817,099.53	136,375.43	8,643,141.30	18,725.32	935,658.75
32	1967	0.2850 579 401	299,186.41	18,759,427.24	168,056.19	9,985,155.72	131,130.22	8,774,271.52	18,005.11	953,644.06
33	1968	0.2740 941 731	287,679.24	19,047,106.48	161,592.49	10,146,748.21	126,086.75	8,900,358.27	17,312.61	970,976.67
34	1969	0.2635 520 896	276,614.65	19,323,721.13	155,377.40	10,302,125.61	121,237.25	9,021,595.52	16,646.74	987,623.41
35	1970	0.2534 154 707	265,975.63	19,589,696.76	149,401.34	10,451,526.95	116,574.29	9,138,169.81	16,006.48	1,003,629.89
36	1971	0.2436 687 219	255,745.80	19,845,442.56	143,655.14	10,595,182.09	112,090.66	9,250,260.47	15,390.85	1,019,020.74
37	1972	0.2342 968 479	245,909.42	20,091,351.98	138,129.94	10,733,312.03	107,779.48	9,358,039.95	14,798.89	1,033,819.63
38	1973	0.2252 854 307	236,451.37	20,327,803.35	132,817.25	10,866,129.28	103,634.12	9,461,674.07	14,229.70	1,048,049.33
39	1974	0.2166 206 064	227,357.08	20,555,160.43	127,708.90	10,993,838.18	99,448.18	9,561,322.25	13,682.41	1,061,731.74
40	1975	0.2082 890 447	218,612.58	20,773,773.01	122,797.01	11,116,635.19	95,815.57	9,657,137.82	13,156.16	1,074,887.90
			$20,773,773.01	$20,773,773.01	$11,116,635.19	$11,116,635.19	$ 9,657,137.82	$9,657,137.82	$1,074,887.90	$1,074,887.90
		Brought forward from Col. 10						1,074,887.90		
		Amount of damages sustained for the forty-year period January 1, 1936, to December 31, 1975						$10,732,025.72		

(See Notes on attached sheet.)

712 *Copy of Exhibit X-2D of March 15, 1939.*

Statement Regarding Amount of Damages Sustained by Connecticut Railway and Lighting Company for the Forty-Year Period January 1, 1936 to December 31, 1975, on Account of the Rejection of the December 19, 1906 Lease by The New York, New Haven and Hartford Railroad Company and Subsequent Agreements Related Thereto.

*This and other ten place interest and annuity tables are set forth in Tables in Kent's Mathematical Principles of Finance (2nd Ed.) 1927.

713 **The annual rental value for the years 1936-1938, inclusive, has been calculated as follows:

There has been added to the net income derived from the transportation properties of Connecticut Railway and Lighting Company for those years, namely, $246,045.34, $179,005.53 and $121,521.83, respectively, the annual earning power, of three-fourths of the contents of the sinking fund referred to in the 1906 lease as at October 23, 1935, namely, $157,028.31, and three-fourths of the annual payments required to be made to such sinking fund, namely, $49,713.75.

714 Thus the annual rental value for the years 1936-1938, inclusive, used in the calculations on the attached statement, is $452,787.40, $385,747.59, and $328,263.89, respectively.

The annual rental value for the years 1939-1975, inclusive, has been calculated as follows:

There has been added to the operating income before Federal income taxes of the transportation properties of Connecticut Railway and Lighting Company for an estimated normal year, namely, $382,809 (such normal year has been obtained by averaging the operating income before Federal income taxes of the transportation properties of Connecticut Railway and Lighting Company for the years

Copy of Exhibit X-2D of March 15, 1939.

715

1925-1938, inclusive, such income for the years 1936-1938, inclusive, having been taken from Exhibit X-4 and such income for the years 1925-1935, inclusive, having been furnished by The New York, New Haven and Hartford Railroad Company), the annual earning power, of three-fourths of the contents of the sinking fund referred to in the 1906 lease as at October 23, 1935, namely, $157,028.31, and three-fourths of the annual payments required to be made to such sinking fund, namely, $49,713.75.

Thus the annual rental value for the years 1939-1975, inclusive, used in the calculations on the attached statement, is $589,551.

716

***$382,809 is the estimated normal operating income before Federal income taxes of the transportation properties of Connecticut Railway and Lighting Company.

717

718

Copy of Exhibit X-2DD of March 15, 1939.

Statement Showing Net Operating Income Before Federal Income Taxes of Connecticut Railway and Lighting Company Transportation Properties for the Years 1925-1938, Inclusive, and Such Income for the Average or Normal Year During Such Period.

Year	Net Operating Income before Fed. Inc. Taxes
719 1925	$602,521**
1926	499,861**
1927	489,642**
1928	749,811**
1929	697,647**
1930	670,682**
1931	504,246**
1932	78,085**
1933	168,362**
1934	106,311**
1935	216,548**
1936	251,069*
720 1937	179,005*
1938	145,535*
Average or normal year during such period	$382,809

**These figures supplied by the Accounting Department of The New York, New Haven & Hartford Railroad Co.

*These figures have been taken from Exhibit X-4.

Copy of Exhibit X-3 of March 13, 1939. 721

Statement Regarding Amount of Damages Sustained by Connecticut Railway and Lighting Company for the Period December 18, 1935 to December 31, 1935, Inclusive, on Account of the Rejection of the December 19, 1906 Lease by The New York, New Haven and Hartford Railroad Company and Subsequent Agreements Related Thereto.

Proportion of three-fourths of the Annual Rental (namely $1,049,563.50) payable under the said 1906 Lease for the period December 18, 1935 to December 31, 1935, inclusive.....	$40,257.06	722
Net Income of transportation properties of Connecticut Railway and Lighting Company for the period December 18, 1935 to December 31, 1935, inclusive.....	$22,839.65	
Earning Power for the period December 18, 1935 to December 31, 1935, inclusive, of three-fourths of the contents of the sinking fund referred to in the said 1906 Lease (consisting of $125,755.96 cash and $3,369,750. principal amount of First and Refunding Mortgage 4½% Bonds)	5,816.26	723
Proportion of three-fourths of the Annual Payments required to be made to said Sinking Fund, attributable to the period December 18, 1935 to December 31, 1935, inclusive	1,906.82	
Rental value for period December 18, 1935 to December 31, 1935, inclusive.....	$30,562.73	
Amount of Damages Sustained for period December 18, 1935 to December 31, 1935, inclusive	$ 9,694.33	

724

Exhibit X-4 of March 13, 1939.

725

(Mounted Opposite ☛)

726

Blank Page

STATEMENT SHOWING NET INCOME FROM TRANSPORTATION PROPERTIES OF CONNECTICUT RAILWAY AND LIGHTING COMPANY FOR THE PERIOD FROM DECEMBER 18, 1935 TO DECEMBER 31, 1938

	Dec. 18, 1935 to Dec. 31, 1935 Inclusive	Jan. 1, 1936 to Nov. 15, 1936 Inclusive	Nov. 16, 1936 to Dec. 31, 1936 Inclusive	Calendar Year 1936	Jan. 1, 1937 to June 30, 1937 Inclusive	July 1, 1937 to Dec. 31, 1937 Inclusive	Calendar Year 1937	Calendar Year 1938
OPERATING REVENUE			$324,390.75		$1,327,490.61	$1,343,870.09	$2,671,360.70	$2,504,226.67
OPERATING EXPENSES:								
Ordinary			179,750.81		801,547.28	815,173.15	1,616,720.43	1,318,410.98
Maintenance			39,009.17		140,059.86	122,112.44	262,172.30	389,250.66
Renewals & Replacements (Depreciation)			50,108.32		199,068.78	165,557.37	364,626.15	375,197.16
Federal Taxes:								
Social Security (Unemployment)			137.21		1,077.64	1,122.43	2,226.07	3,199.24
Excise on Tires			956.45		2,724.81	2,485.26	5,210.07	2,573.46
Social Security (Retirement)			-------		5,383.26	5,458.01	10,841.27	10,377.97
State and Local Taxes:								
Bus and Truck Registration			3,420.98		15,864.93	19,136.63	35,001.56	37,374.26
Gross Receipts			9,672.43		38,635.93	39,060.05	77,696.00	74,579.24
Unemployment Compensation			1,235.06		9,850.36	10,099.75	19,950.11	28,792.79
Gasoline			4,687.42		27,026.49	40,436.51	67,463.00	76,207.74
Real Estate			959.29		1,430.93	1,007.46	2,438.39	4,692.36
Other			-------		-------	-------	-------	4.00
TOTAL OPERATING EXPENSES			289,337.14		1,242,690.29	1,221,649.06	2,464,339.35	2,320,999.86
OPERATING INCOME			45,053.61		84,800.32	122,221.03	207,021.35	183,626.81
NON-OPERATING INCOME:								
Miscellaneous Rents			174.00		1,932.30	2,375.45	4,307.75	3,100.22
GROSS INCOME			45,227.61		86,732.62	124,596.48	211,329.10	186,727.03
Federal Tax Bondholders' Interest			2,734.34		1,329.34	1,259.23	2,582.57	2,461.74
Federal Capital Stock Tax			500.00		1,718.75	1,718.75	3,437.50	6,007.50
Federal Other			62.50		-------	-------	-------	-------
			3,316.84		3,048.09	2,977.98	6,020.07	8,469.24
INCOME BEFORE INCOME DEDUCTIONS, ADJUSTMENTS AND FEDERAL INCOME TAX	$22,756.78(A)	$188,316.12(A)	41,910.77	$230,226.89	83,690.53	121,618.50	205,309.03	178,257.79
INCOME DEDUCTIONS:								
Interest on Equipment Purchase Contracts	264.01	2,769.93	1,313.65	4,083.58	16,837.09	28,366.93	45,204.02	44,033.24
Miscellaneous Rents	-------	-------	1,151.04	1,151.04	1,893.40	1,893.40	3,786.80	135.68
TOTAL INCOME DEDUCTIONS	264.01	2,769.93	2,464.69	5,234.62	18,730.49	30,260.33	48,990.82	44,168.92
INCOME BEFORE ADJUSTMENT AND FEDERAL INCOME TAX	22,492.77	185,546.19	39,446.08	224,992.27	64,960.04	91,358.17	156,318.21	134,088.87
ADD ADJUSTMENTS:								
Insurance and Casualty Reserve	346.88	23,067.30	-------	23,067.30	-------	-------	-------	-------
Net Earnings of Controversial Bus Routes Turned Over to Connecticut Railway and Lighting Company	------	-------	3,009.88	3,009.88	11,274.11	11,413.21	22,687.32	11,446.26
	346.88	23,067.30	3,009.88	26,077.18	11,274.11	11,413.21	22,687.32	11,446.26
NET INCOME AFTER ADJUSTMENT AND BEFORE FEDERAL INCOME TAX	22,839.65	208,613.49	42,455.96	251,069.45	76,234.15	102,771.38	179,005.53	145,535.13
Federal Income Tax Attributable to Transportation Properties	-------	-------	5,024.11	5,024.11	-------	-------	-------	24,013.30
NET INCOME	$22,839.65	$208,613.49	$37,431.85	$246,045.34	$76,234.15	$102,771.38	$179,005.53	$121,521.83

(A) The net cash credit from operation of the Connecticut Railway and Lighting Company transportation properties for the period from December 18, 1935 to November 15, 1936, inclusive, was $333,227.70 as reported to the Court by The Connecticut Company and Connecticut Railway and Lighting Company pursuant to orders of the Court (No. 107 in The New York, New

TOTAL INCOME DEDUCTIONS	264.01	2,769.93	2,464.69	5,234.62	18,730.49	30,260.33	48,990.82	44,168.92
INCOME BEFORE ADJUSTMENT AND FEDERAL INCOME TAX	22,492.77	185,546.19	39,446.88	224,992.27	64,960.04	91,358.17	156,318.21	134,088.87
ADJUSTMENTS:								
Insurance and Casualty Reserve	346.88	23,067.30	----------	23,067.30	----------	----------	----------	----------
Net Earnings of Controversial Bus Routes Turned Over to Connecticut Railway and Lighting Company	------	----------	3,009.88	3,009.88	11,274.11	41,413.21	22,687.32	11,446.26
	346.88	23,067.30	3,009.88	26,077.18	11,274.11	11,413.21	22,687.32	11,446.26
NET INCOME AFTER ADJUSTMENT AND BEFORE FEDERAL INCOME TAX	22,839.65	208,613.49	42,455.96	251,069.45	76,234.15	102,771.38	179,005.53	145,535.13
Federal Income Tax Attributable to Transportation Properties	----------	----------	5,024.11	5,024.11	----------	----------	----------	24,013.30
NET INCOME	$22,839.65	$208,613.49	$37,431.85	$246,045.34	$76,234.15	$102,771.38	$179,005.53	$121,521.83

(A) The net cash avails from operation of the Connecticut Railway and Lighting Company transportation properties for the period from December 18, 1935 to November 15, 1936, inclusive, was $333,227.70 as reported to the Court by The Connecticut Company and Connecticut Railway and Lighting Company pursuant to orders of the Court (Dp. 107 in The New York, New Haven and Hartford Railroad Company proceeding and No. 38 in The Connecticut Company proceeding) entered October 29, 1936. Said $333,227.70 represented the net income for such period of $170,403.90 after deduction of depreciation in the amount of $162,129.83 and an additional item of $693.97. By supplemental stipulation dated September 27, 1937 it was agreed that the depreciation for the year November 1, 1935 to October 31, 1936 on the property repossessed by Connecticut Railway and Lighting Company was $133,938.53. The depreciation, $162,129.83, deducted for the period from December 18, 1935 to November 16, 1936, in arriving at the said income from operations for that period, has been adjusted to place the depreciation on the same basis as agreed upon for the period from November 1, 1935 to October 31, 1936. This adjustment results in a reduction of the depreciation allowance for the period from December 18, 1935 to November 16, 1936 from $162,129.83, to $121,660.83, or $40,469. with a corresponding increase in the income from operations for the period from $170,403.90 to $211,072.90. This amount of net income has been allocated to the period from December 18, 1935 to December 31, 1935 and the period from January 1, 1936 to November 15, 1936 as indicated.

730 **Copy of Exhibit X-5 of March 13, 1939.**

Statement Regarding Annual Earning Power of Three-fourths of the Contents of the Sinking Fund Referred to in the Lease of December 19, 1906 as at October 23, 1935 (Sinking Fund for First and Refunding Mortgage 4½% Fifty Year Gold Bonds of Connecticut Railway and Lighting Company).

		Cash	Principal Amount of Said First and Refunding Mortgage Bonds
731	The New York, New Haven and Hartford Railroad Company and Connecticut Railway and Lighting Company have previously stipulated ((8) of Exhibit 1 in Record) that three-fourths of the contents of the sinking fund referred to in the December 19, 1906 lease amounted on October 23, 1935 to	$125,755.96	$3,369,750.
732	$119,768. principal amount of said Bonds could be purchased if the said $125,755.96 were used to purchase additional Bonds on January 1, 1936 at the call price of 105%		119,768.
			$3,489,518.
	The annual earning power of $3,489,518 principal amount of said First and Refunding Mortgage Bonds at 4½% (the interest rate on Bonds in Sinking Fund) is		$ 157,028.31

Copy of Exhibit X-6 of March 13, 1939.

(Mounted Opposite ☛)

Blank Page

STATEMENT SHOWING NET OPERATING INCOME BEFORE FEDERAL TAXES OF CONNECTICUT RAILWAY AND LIGHTING COMPANY TRANSPORTATION PROPERTIES FOR THE YEARS 1924-1938, INCLUSIVE, AND SUCH INCOME FOR THE AVERAGE OF [illegible]

	ACTUAL*			ESTIMATED PROPORTION**, OF NET OPERATING INCOME BEFORE FEDERAL INCOME TAXES OF THE CONNECTICUT COMPANY (INCLUDING SUCH INCOME D[illegible] PROPERTIES OF CONNECTICUT RAILWAY AND LIGHTING COMPANY) AS REPORTED IN THE ANNUAL REPORTS OF THE CONNECTICUT PUBLIC UTILITIES C[illegible] PUBLIC DOCUMENT #56), ATTRIBUTABLE TO THE CONNECTICUT RAILWAY AND LIGHTING COMPANY TRANSPORTATION PROPER[illegible]							
	1938	1937	1936	1935	1934	1933	1932	1931	1930	1929	1928
(1) Railway Operating Revenues				$8,336,359.05	$8,250,653.95	$7,865,257.17	$8,528,588.57	$10,432,644.09	$11,956,814.71	$13,399,100.84	$13,734,202.47
(2) Railway Operating Expenses				6,729,985.28	6,722,449.57	6,183,882.62	7,115,420.92	7,836,376.80	9,086,520.73	10,546,906.51	10,772,127.46
NET REVENUE				1,576,253.77	1,528,204.38	1,681,374.55	1,413,167.65	2,596,267.29	2,870,293.98	2,852,194.33	2,915,[illegible]
(3) Less: Taxes Other Than Federal Income Taxes				397,405.94	429,619.36	353,593.80	415,700.95	440,682.81	470,347.16	511,685.14	552,[illegible]
(5) OPERATING INCOME BEFORE FEDERAL INCOME TAXES OF THE CONNECTICUT COMPANY (INCLUDING CONNECTICUT RAILWAY AND LIGHTING COMPANY TRANSPORTATION PROPERTIES)				1,178,847.83	1,098,585.02	1,327,780.75	997,466.70	2,155,584.48	2,399,946.82	2,340,509.19	2,422,[illegible]
(6) OPERATING INCOME BEFORE FEDERAL INCOME TAXES OF TRANSPORTATION PROPERTIES OF CONNECTICUT RAILWAY AND LIGHTING COMPANY	$145,539.13	$179,005.53	$251,069.45	$115,077.30	$91,173.20	$180,418.34	$48,202.61	$370,773.36	$402,421.78	$333,539.[illegible]	$349,[illegible]

* For the years 1936-1938, inclusive, the earnings derived from the Connecticut Railway and Lighting Company transportation properties and those derived from The Connecticut Company properties were kept separately a[illegible] been actually determined as set forth above.

** Prior to 1936 the Connecticut Railway and Lighting Company transportation properties were leased and operated by The Connecticut Company together with the latter's own properties, and no segregation of earnings fr[illegible] made. The earnings attributable to each company's property for each period prior to 1936 is, therefore, a matter of estimate. The only basis known to Connecticut Railway and Lighting Company upon whi[illegible] is suggested and relied on by James Garfield, Esq., Attorney for The Connecticut Company, who, in a hearing on December 7, 1935 in The Connecticut Company proceeding for reorganization, said:

> "Some they hold as sub-lessee and some outright. Roughly two-thirds is owned and one-third leased. The more accurate figures are on the revenue basis. About thirty per cent of the income comes from t[illegible] seventy per cent from the owned property. On the expense side about one-third of the expense appertains to the leased property and two-thirds to the owned property. The owned property has a little better[illegible] expense than the leased property. There is a little more revenue left over."

* Accordingly, the operating income before federal income taxes of transportation properties of Connecticut Railway and Lighting Company as shown for the years 1924-1935, inclusive, (line (6) above) was determined a[illegible] railway operating revenues for those years (line (1) above) was subtracted 33-1/3% of the aggregate of railway operating expenses (line (2) above) and taxes other than Federal income taxes (line (4) above).

THE AVERAGE OR NORMAL YEAR DURING SUCH PERIOD

INCLUDING SUCH INCOME DERIVED FROM THE TRANSPORTATION
OUT PUBLIC UTILITIES COMMISSION (STATE OF CONNECTICUT
TRANSPORTATION PROPERTIES

	1928	1927	1926	1925	1924	AVERAGE OR NORMAL YEAR
00.84	$13,734,282.47	$14,185,034.60	$14,649,682.22	$14,522,176.84	$14,374,838.54	
06.51	10,759,127.46	11,563,166.13	11,917,518.06	11,585,187.57	11,590,736.26	
98.33	2,975,054.82	2,621,868.47	2,732,164.16	2,936,989.25	2,784,102.28	
85.14	552,423.66	529,451.60	528,376.75	519,466.65	515,685.94	
09.19	2,422,571.16	2,102,416.87	2,203,787.41	2,417,522.60	2,268,416.34	$1,909,452.93
33.03	$349,682.97	$227,971.14	$246,273.07	$321,768.39	$276,977.49	$255,925.51

were kept separately and thus the former can be and have

rtion of earnings for the individual properties was
epony upon which to make such an estimate is the formula

the income comes from the leased property and
rty has a little better ratio of revenue and

above) was determined as follows: From 30% of the
(line (4) above).

736

Copy of Exhibit X-7 of March 13, 1939.

737

(Mounted Opposite ☛)

738

Annual Average Yield Percent
Year
1919
1920
1921
1922
1923
1924
1925
1926
1927
1928
1929
1930
1931
1932
1933
1934
1935
1936
1937
1938
1939
1940
6
5
4
3
2
1
Average 1919-1939
CHART OF UNITED STATES TREASURY BOND YIELDS
BASED ON STANDARD STATISTICS COMPANY, INC.
INDEX OF INTEREST RATE ON TREASURY BONDS
Annual Average Yield Percent
6
5
4
3
2
1
Year
1919
1920
1921
1922
1923
1924
1925
1926
1927
1928
1929
1930
1931
1932
1933
1934
1935
1936
1937
1938
1939
1940
3-9-39 - ABO

Blank Page

INTEREST RATE ON TREASURY BONDS (U.S.)

UNIT: PERCENT. AN AVERAGE OF DAILY RATES.

(From Standard Trade and Securities Basic Statistics--Banking and Finance Friday, January 21, 1938 - page A-27; and February, 1939 - Current Statistics Friday, February 17, 1939 - page 7)

Year	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.	Aver.
	*	*											*
1939	2.45	2.39											2.42
1938	2.65	2.64	2.64	2.62	2.51	2.52	2.52	2.51	2.58	2.48	2.50	2.49	2.56
1937	2.47	2.46	2.60	2.80	2.76	2.76	2.72	2.72	2.77	2.76	2.71	2.67	2.68
1936	2.48	2.42	2.54	2.51	2.50	2.50	2.50	2.43	2.41	2.42	2.29	2.30	2.48
1935	2.83	2.73	2.69	2.64	2.61	2.61	2.59	2.66	2.78	2.77	2.73	2.73	2.70
1934	3.30	3.32	3.21	3.12	3.01	2.94	2.85	2.99	3.20	3.08	3.05	2.97	3.10
1933	3.19	3.29	3.44	3.43	3.31	3.22	3.20	3.21	3.20	3.22	3.46	3.53	3.31
1932	4.32	4.11	3.91	3.66	3.71	3.73	3.55	3.42	3.38	3.39	3.39	3.31	3.66
1931	3.17	3.27	3.26	3.24	3.13	3.10	3.11	3.13	3.24	3.62	3.99	3.92	3.31
1930	3.43	3.41	3.29	3.36	3.30	3.24	3.23	3.25	3.23	3.28	3.17	3.20	3.28
1929	3.52	3.62	3.74	3.63	3.64	3.69	3.64	3.70	3.68	3.60	3.36	3.37	3.60
1928	3.18	3.19	3.17	3.20	3.24	3.29	3.42	3.49	3.46	3.48	3.39	3.46	3.33
1927	3.51	3.48	3.37	3.35	3.31	3.34	3.36	3.32	3.30	3.29	3.23	3.17	3.34
1926	3.77	3.71	3.71	3.70	3.67	3.67	3.68	3.70	3.70	3.68	3.62	3.56	3.68
1925	3.96	3.95	3.96	3.93	3.87	3.79	3.79	3.85	3.85	3.82	3.79	3.80	3.86
1924	4.30	4.28	4.28	4.23	4.15	3.98	3.94	3.91	3.92	3.87	3.96	3.96	4.06
1923	4.32	4.33	4.38	4.39	4.37	4.34	4.34	4.35	4.36	4.40	4.37	4.35	4.36
1922	4.45	4.50	4.42	4.28	4.26	4.24	4.14	4.12	4.19	4.30	4.36	4.35	4.30
1921	5.23	5.28	5.27	5.24	5.25	5.27	5.26	5.22	5.12	4.83	4.64	4.47	5.09
1920	4.93	5.05	5.09	5.28	5.58	5.53	5.57	5.67	5.44	5.08	5.21	5.40	5.32
1919	4.57	4.62	4.62	4.60	4.55	4.58	4.62	4.66	4.61	4.60	4.69	4.77	4.62

Source of data - Federal Reserve Board

Total ---- 75.06

Average — 3.57

* To February 28, 1939 - From the Monthly Review of Credit and Business Conditions Second Federal Reserve District - Federal Reserve Bank, New York--March 1,1939.

3-9-39 - ADC

742

Copy of Exhibit X-8 of March 13, 1939.

743

(Mounted Opposite ☛)

744

Blank Page

CHART OF MUNICIPAL BOND YIELDS

BASED ON STANDARD STATISTICS COMPANY, INC.

INDEX OF MUNICIPAL BOND YIELDS

Blank Page

STANDARD STATISTICS COMPANY, INC.

INDEX OF MUNICIPAL BOND YIELDS

Year	Annual Average Yield Percent	Year	Annual Average Yield Percent	Year	Annual Average Yield Percent	Year	Annual Average Yield Percent
1900	3.12	1910	3.97	1920	4.98	1930	4.07
1901	3.13	1911	3.98	1921	5.09	1931	4.01
1902	3.20	1912	4.02	1922	4.23	1932	4.65
1903	3.38	1913	4.22	1923	4.25	1933	4.71
1904	3.45	1914	4.12	1924	4.20	1934	4.03
1905	3.40	1915	4.16	1925	4.09	1935	3.41
1906	3.57	1916	3.94	1926	4.08	1936	3.07
1907	3.86	1917	4.20	1927	3.98	1937	3.10
1908	3.93	1918	4.50	1928	4.05	1938	2.91
1909	3.79	1919	4.46	1929	4.27	*1939	2.71

40-Year Total ——— 156.28
40-Year Average —— 3.91

* To first week in February, 1939

Month	1929	1930	1931	1932	1933	1934	1935	1936	1937	1938	1939
January	4.16	4.22	3.92	4.92	4.23	4.67	3.57	3.27	2.79	3.03	2.70
February	4.25	4.24	3.95	5.03	4.28	4.48	3.48	3.22	2.96	2.99	*
March	4.32	4.12	3.89	4.79	4.88	4.23	3.41	3.18	3.19	2.99	
April	4.29	4.11	3.80	4.73	5.05	4.12	3.40	3.17	3.24	3.03	
May	4.23	4.11	3.75	4.77	5.27	4.00	3.43	3.16	3.14	2.91	
June	4.26	4.10	3.76	4.81	4.71	3.88	3.43	3.16	3.11	2.91	
July	4.28	4.05	3.85	4.78	4.60	3.85	3.32	3.13	3.07	2.87	
August	4.31	3.97	3.85	4.90	4.54	3.88	3.35	3.06	3.01	2.82	
September	4.32	3.97	3.91	4.39	4.59	3.94	3.44	2.97	3.18	3.02	
October	4.29	3.94	4.35	4.37	4.60	3.84	3.45	2.94	3.24	2.82	
November	4.25	4.00	4.42	4.38	4.89	3.78	3.34	2.85	3.17	2.74	
December	4.22	4.05	4.64	4.37	4.89	3.69	3.31	2.76	3.15	2.73	
Total	51.18	48.88	48.07	55.84	56.53	48.36	40.92	36.87	37.25	34.88	
Average	4.27	4.07	4.01	4.65	4.71	4.03	3.41	3.07	3.10	2.91	

* First week of February, 1939 — 2.72

3-9-39 - MDO

Blank Page

BONDS USED IN MUNICIPAL BOND INDEX

(From Standard Trade and Securities,
Basis Statistics
Security Indexes Weekly and Monthly
Friday, May 29, 1936 - page B-114)

The bonds used in the preparation of the Municipal Bond Indexes are tabulated below. The date on which the bond was included, or excluded, is shown in parenthesis. Bonds in the index at the present time are preceded by a star (*).

*Baltimore 3½s, '45 (1-'00)
*Boston 3½s, '45 (1-'06)
*Cincinnati 4½s, '55 (1-'21)
*Indianapolis 4s, '41 (7-15-'31)
*Los Angeles 4s, '45 (3-'06)

*Milwaukee 5s, '40 (1-'25)
*Minneapolis 4s, '44 (1-'18)
*Nashville 4½s, '40 (7-15-'31)
*New York City 4½s, '81 (8-23-'33)
*Newark 4½s, '59 (7-15-'31)

*Philadelphia 4s, '64 (1-'18)
*Pittsburgh 4½s, '50 (1-'25)
*Portland 4½s, '39 (7-15-'31)
*Richmond 4½s, '64 (7-15-'31)
*St. Louis 4s, '50 (7-15-'31)

Boston 3½s, '38 (1-'00 to 12-'02)
Boston 3½s, '42 (1-'03 to 12-'05)
Buffalo 4s, '60 (1-'18 to 7-8-'31)
Buffalo 3½s, 127 (1-'00 to 12-'17)
Chicago 4s, '39 (1-'21 to 7-8-'31)

Chicago 3½s, '19 (1-'00 to 12-'05)
Chicago 4s, '25 (1-'06 to 12-'17)
Chicago 4s, '31 (1-'18 to 12-'20)
Cleveland 4½s, '38 (1-'18 to 7-8-'31)
Cleveland 4s, '31 (1-'00 to 12-'17)

Cincinnati 4s, '49 (1-'18 to 12-'20)
Cincinnati 3.65s, '37 (1-'00 to 12-'17)
Detroit 4½s, '52 (1-'25 to 7-8-'31)
Detroit 3½s, '30 (1-'00 to 12-'24)
Los Angeles 4s, '38 (1-'00 to 12-'01)

Los Angeles 4s, '39 (1-'02 to 12-'06)
Milwaukee 5s, '17 (1-'00 to 12-'01)
Milwaukee 3½s, '21 (1-'02 to 12-'17)
Milwaukee 4½s, '35 (1-'18 to 12-'24)
Minneapolis 3½s, '29 (1-'08 to 12-'17)

Newark 4s, '61 (1-'18 to 7-18-'31)
Newark 3½s, '29 (1-'00 to 12-'17)
New York (Docks) 3½s, '27 (1-'00 to 12-'17)
New York (N.Y.) 3½s, '50 (1-'18 to 8-16-'33)
Philadelphia 4s, '34 (1-'11 to 12-'17)

Philadelphia 3½s, '24 (1-'00 to 12-'10)
Pittsburgh 3½s, '30 (15-30) (1-'00 to 12-'02)
Pittsburgh 3½s, '30 (1-'03 to 3-'06)
Pittsburgh 4s, '39 (1-'18 to 12-'24)
Pittsburgh 3½s, '30 ('09-30) (3-'06 to 12-'17)

St. Louis 4½s, '38 (1-'25 to 7-8-'31)
St. Louis 3½s, '20 (1-'00 to 12-'22)
St. Louis 3½s, '22 (1-'03 to 12-'17)
St. Louis 4s, '31 (1-'18 to 12-'24)

3-7-39 - ADS

748

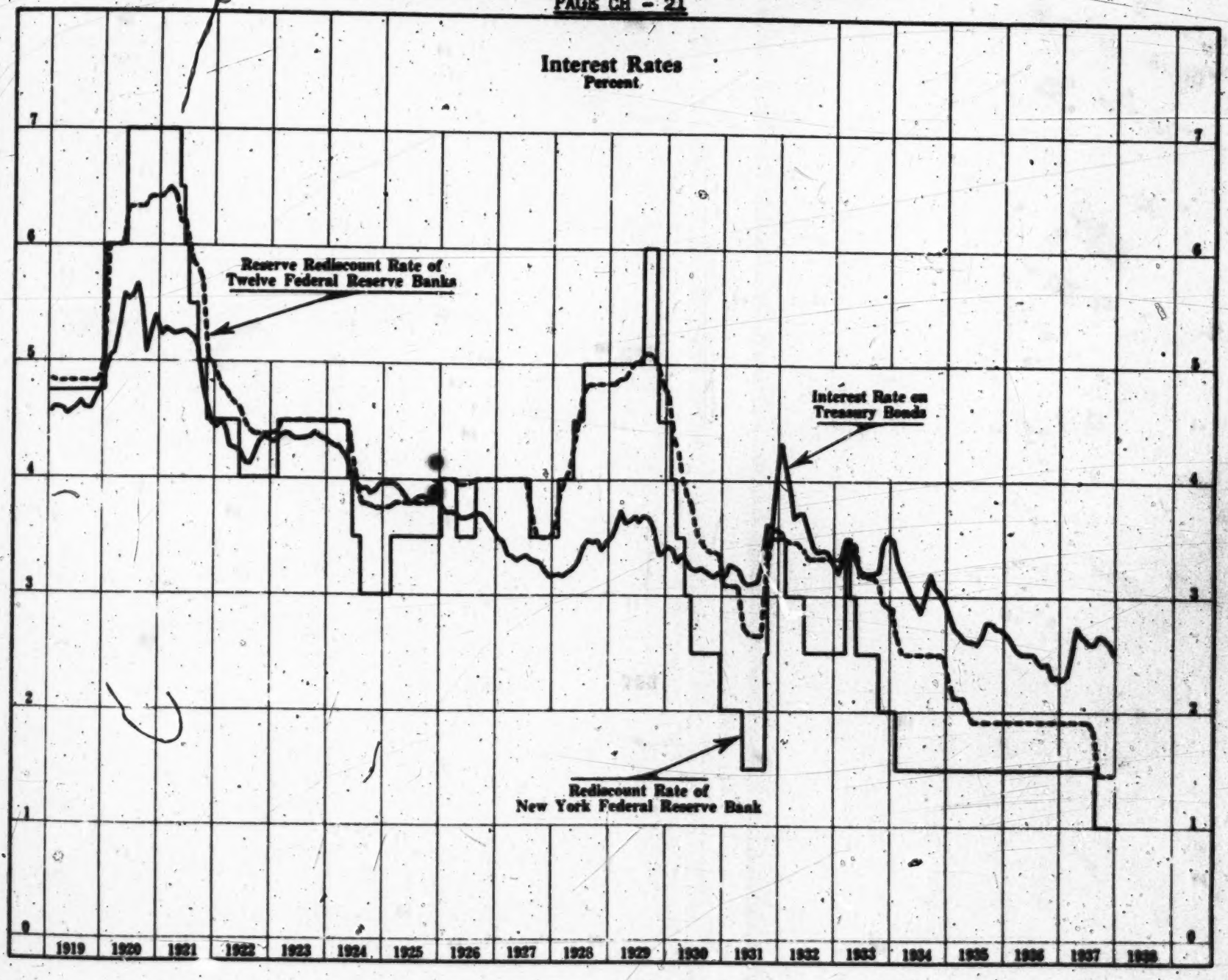
Copy of Exhibit X-9 of March 13, 1939.

749

(Mounted Opposite ☛)

750

SOURCE
STANDARD TRADE AND SECURITIES
FRIDAY, MARCH 4, 1938
CHARTS
A GRAPHIC HISTORY OF BUSINESS AND SECURITY TRENDS
PAGE CH - 21



754

755

Copy of Exhibit X-10 of March 13, 1939.

(Mounted Opposite ☛)

756

Blank Page

Ex 91.1

CHART I – ABSOLUTE GROWTH OF LIFE INSURANCE ASSETS – 1906 - 1937

(Of Companies Holding From 91.6% to 98.4% Of The Assets Of All U. S. Legal Reserve Companies. See Table I)

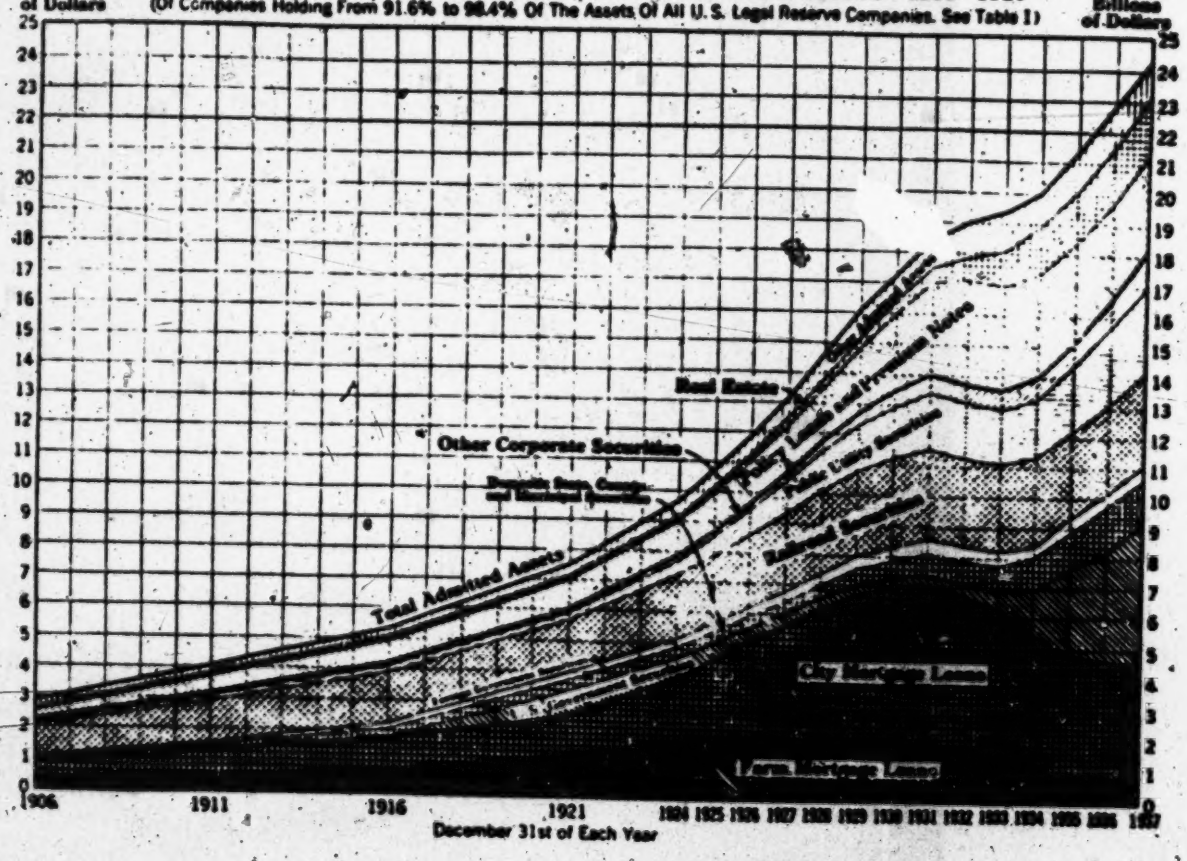
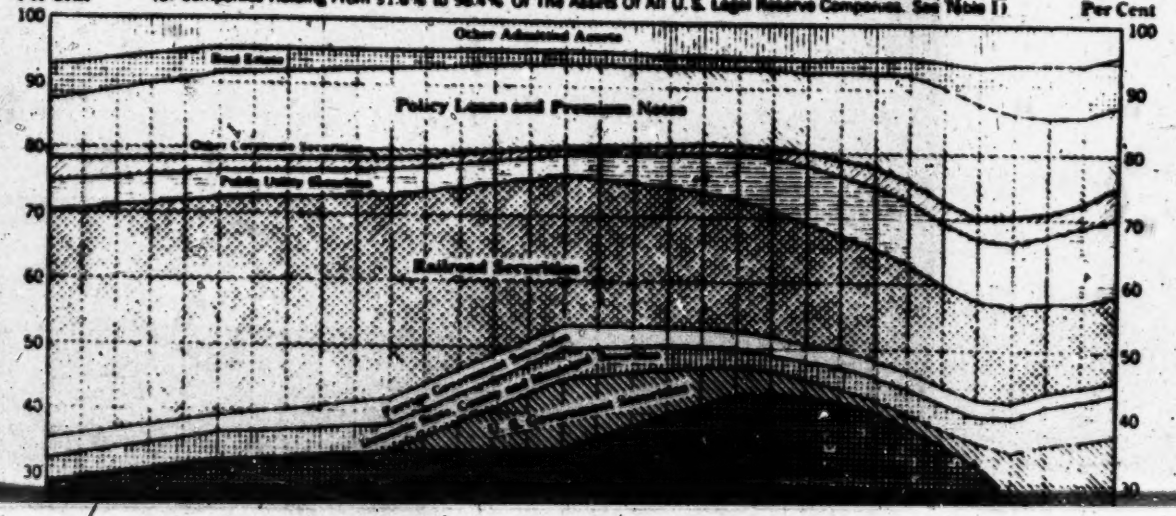
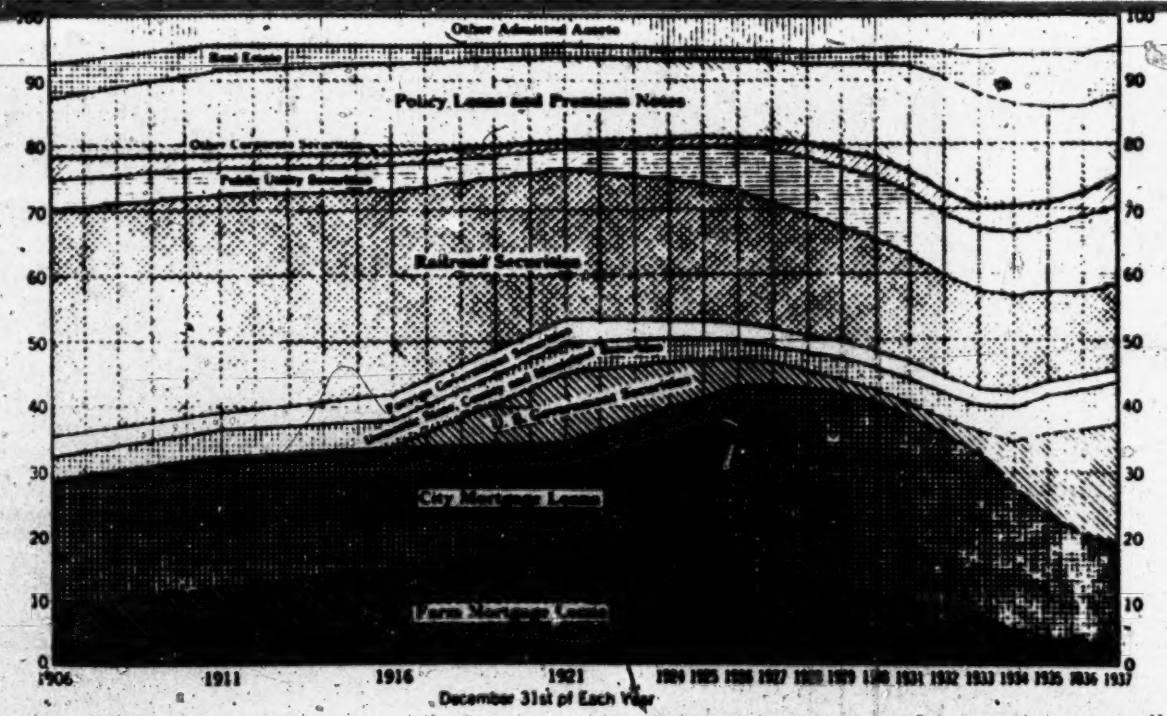


CHART II – RELATIVE GROWTH OF LIFE INSURANCE ASSETS – 1906 - 1937

(Of Companies Holding From 91.6% to 98.4% Of The Assets Of All U. S. Legal Reserve Companies. See Table I)





In report to Assn. of Life Insurance Presidents. December 1937

TOWERS, PERRIN, FORSTER & CROSBY, INC
Philadelphia Rev. January 10, 1937

760 **Copy of Exhibit X-11 of March 15, 1939.**

THE CONNECTICUT COMPANY

Percent of Connecticut Railway and Lighting Company to Connecticut Company System Total

Year	*Total Operating Revenues*	*Total Operating Expenses*	*Net Operating Revenue*
1925	32.52	34.32	25.41
1926	32.53	34.54	23.75
1927	32.17	34.02	24.03
761 1928	32.30	32.97	29.85
1929	32.64	33.58	29.17
1930	31.61	32.80	27.83
1931	30.69	32.88	24.07
1932	29.79	33.02	13.53
1933	29.94	33.79	15.78
1934	29.92	33.30	15.06
9 Mos. 1935	29.73	31.63	21.44

NOTE: Figures for years 1925-1929 inclusive are separated between C. R. & L. Co. and Conn. Co. on a divisional basis while the years 1930-1934 and 9 Months of 1935 are taken from Schedule "A".

762

Statistics & Research Dept.,
New Haven, Conn.,
December 2, 1935.

Copy of Exhibit X-12 for Identification of March 15, 1939.

(Mounted Opposite ☛)

Blank Page

STATEMENT OF ESTIMATED OPERATING INCOME OF THE CONNECTICUT RAILWAY & LIGHTING COMPANY PROPERTY - YEARS 1925-1935 INCLUSIVE

Year	System Operating Revenues	C.R.& L. Co. Operating Revenues	System Operating Expenses	C.R.& L.Co. Operating Expenses	C.R.& L. Co. Net Revenue	C.R.& L. Co. Taxes *	C.R.& L. Co. Operating Income
1935	$ 8,336,159	$ 2,470,921	$ 6,759,905	$ 2,128,160	$342,761	$126,213	$216,548
1934	8,250,654	2,468,630	6,722,450	2,238,437	230,193	123,882	106,311
1933	7,865,257	2,355,103	6,183,883	2,089,733	265,370	97,008	168,362
1932	8,528,569	2,541,056	7,115,421	2,349,806	191,248	113,163	78,085
1931	10,432,644	3,201,357	7,836,377	2,576,504	624,853	120,607	504,246
1930	11,956,814	3,779,472	9,086,520	2,980,554	798,918	128,236	670,682
1929	13,399,100	4,373,725	10,546,906	3,541,651	832,074	134,427	697,647
1928	13,734,222	4,435,634	10,759,127	3,547,284	888,350	138,539	749,811
1927	14,185,034	4,563,648	11,563,166	3,933,789	629,859	140,217	489,642
1926	14,649,682	4,765,089	11,917,519	4,116,311	648,778	148,917	499,861
1925	14,522,176	4,722,199	11,585,187	3,976,036	746,163	143,602	602,521

* Excludes Federal Income Taxes

Accounting Department,
New Haven, Conn.,
March 13, 1939.

766

Copy of Exhibit Y-1 of March 15, 1939.

767

(Mounted Opposite ☛)

768

Blank Page

STATEMENT OF ESTIMATED OPERATING INCOME OF THE CONNECTICUT RAILWAY & LIGHTING COMPANY PROPERTY - YEARS 1921-1935 INCLUSIVE.

Year	System Operating Revenues	C.R.& L.Co. Operating Revenues	System Operating Expenses	C.R.& L.Co. Operating Expenses	C.R.& L.Co. Net Revenue	C.R.& L. Co. Taxes *	C.R.& L.Co. Operating Income
1935	$ 8,356,158	$2,470,921	$6,759,905	$2,128,160	$342,761	$126,213	$216,548
1934	8,250,654	2,468,630	6,722,450	2,238,457	230,193	123,682	106,511
1933	7,865,257	2,555,105	6,183,883	2,089,735	265,370	97,008	168,362
1932	8,538,589	2,541,056	7,115,421	2,349,808	191,248	115,185	76,085
1931	10,458,644	3,201,357	7,856,377	2,576,804	624,853	120,607	504,246
1930	11,956,814	3,779,472	9,036,520	2,980,554	798,918	128,236	670,682
1929	15,399,100	4,575,725	10,546,906	3,541,651	832,074	108,782	723,292
1928	13,734,332	4,436,634	10,769,127	3,547,284	889,350	112,856	776,494
1927	14,185,034	4,563,648	11,563,166	3,933,769	629,859	122,379	507,480
1926	14,649,682	4,765,089	11,917,519	4,116,311	648,778	131,081	517,697
1925	14,522,176	4,722,159	11,585,187	3,976,036	746,123	131,142	614,981
1924	14,374,859	4,724,491	11,590,756	3,907,494	816,997	130,655	686,342
1923	14,717,253	4,995,575	11,673,454	4,017,531	977,844	143,794	834,050
1922	14,477,611	4,751,993	11,177,594	3,801,294	950,699	133,360	817,339
1921	14,619,210	4,484,295	11,837,335	4,036,139	448,154	126,106	330,048

* Excludes Federal Income Taxes.

Accounting Department,
New Haven, Conn.,
March 14, 1939.

772 **Copy of Exhibit Y-2 of March 15, 1939.**

THE CONNECTICUT COMPANY

Operating Income of the Controversial Routes Awarded to the C. R. & L. Co. by Court Order No. 62-A from Date of Their Institution

Year	*Amount*
1937	$20,926.89
1936	21,622.21
773 1935	21,770.35
1934	18,624.04
1933	17,461.48
1932	21,329.54
1931	28,864.77
1930	31,771.81
1929	34,166.19
1928	34,433.16
1927	31,688.25
1926	30,344.65
1925	28,434.54
1924	20,212.69
774 1923	11,277.05
1922	7,612.53
1921	5,862.00

The above figures do not include the adjustments on account of the Exp. & Frt. Dept. and Derby Coal Haul, which were as follows:

1936	$12,061.19
1935	612.64 (14 Da.--Dec. 18-31, 1935.)

* Includes $917.59 for period December 18-31, 1935.

March 15th, 1939.

Copy of Exhibit Y-3 of March 15, 1939. 775

THE CONNECTICUT COMPANY

Operating Income of The Connecticut Company and C. R. & L. Company Combined Before Federal Income Taxes

Year	*Amount*
1935	$1,178,848.00
1934	1,098,584.63
1933	1,327,780.86
1932	997,467.40 776
1931	2,155,584.40
1930	2,399,947.35
1929	2,340,509.00
1928	2,422,471.10
1927	2,102,417
1926	2,203,787
1925	2,417,522
1924	2,268,416
1923	2,541,169
1922	2,815,521
1921	2,268,262
1920	14,660
1919	1,274,930 777
1918	1,285,816
1917	1,628,832
1916	2,610,855
1915	2,246,606
1914	2,341,862
1913	2,588,081
1912	2,485,589
1911	1,928,385
1910	2,744,283
1909	2,849,657
1908	2,309,504
1907	1,631,261

778 **Copy of Exhibit Y-4 of March 15, 1939.**

THE CONNECTICUT COMPANY

Percent of Connecticut Railway and Lighting Company to Connecticut Company System Total

(Including Operation of Controversial Routes Awarded C. R. & L. Co. by Order 62-A)

779

Year	*Total Operating Revenues*	*Total Operating Expenses*	*Net Operating Revenue*
1921	30.78	34.08	16.72
1922	33.04	34.20	29.13
1923	34.24	34.66	32.62
1924	33.32	34.06	30.27
1925	33.13	34.78	26.62
1926	33.17	35.01	25.14
1927	32.87	34.54	25.54
1928	33.07	33.55	31.31
1929	33.44	34.19	30.68
1930	32.44	33.46	29.23
1931	31.55	33.57	25.47
1932	30.61	33.62	15.45
780 1933	30.69	34.38	17.12
1934	30.67	33.87	16.62
1935	30.40	32.04	23.37
1936	29.96	31.05	24.91
1937	31.37	31.54	30.37

Accounting Department,
New Haven, Conn.,
March 14, 1939.

Exhibit W.

781

New Haven, Conn., March 24, 1939

Mr. H. J. Wells:

In accordance with Mr. Martin's request as I understood it, I am showing below a statement of debits and credits to the Profit and Loss Account of The Connecticut Company arising from the sale, abandonment, or retirement without replacement of Road and Equipment Property located in Connecticut Railway and Lighting Company territory, so far as I can identify such items in the Annual Reports of the Connecticut Public Utilities Commission.

782

In the interest of clarity let me state that the Classification of Accounts, under which the Connecticut Company operated and still does operate with the approval of the Connecticut Public Utilities Commission, is the Uniform System of Accounts for Electric Railways, issue of 1914, prescribed by the Interstate Commerce Commission. This Classification requires that any profit or any loss arising from the abandonment or other permanent disposition of roadway property and land not replaced shall be accounted for through Profit and Loss Account and not through the Income Account.

783

The items which appear as credits in the debit column arise from adjustment of items reported as debits in earlier years.

784

Exhibit W.

Accounting Year	*Item*	*Debit*	*Cred*
1925	Westport—track, Compo Beach	$ 36,996.39	$
1926	Not shown in detail		
1927	Not shown in detail		
1928	Not shown in detail		
1929	Bridgeport—Seaview Ave., 3 feeder cables taken down on Seaview Ave., written off in 1928, then sent to storeroom for further use		$ 3,87
	Bridegport shops—engine lathe	$ 400.00	
785	Shelton—land, Pine Rock Park	1,997.00	
	Walnut Beach, Milford—trolley express station	382.94	
	Bridgeport—Oak Street line	42,572.22	
	Stratford—Paradise Green—Shelton line	293,696.45	
1930	Bridgeport shops—wheel press	1,330.00	
	Fairfield—turnout	1,599.42	
	New Britain—Farmington Ave. line	1,551.43	
1931	Naugatuck—sale of land		1,20
	New Britain—Northend line	62,172.45	
	Norwalk—track 2	17,817.41	
	Norwalk—Dorlons Point line	31,438.59	
786	Waterbury—carbarn	1,985.01	
	New Britain—carbarn "C"	5,357.80	
	Norwalk—Newtown Ave.	12,615.84	
	Waterbury—Baldwin Street	72,045.09	
1932	CR&L Properties — various sales & exchanges		14,46
	Stratford—land	1,577.24	
	New Britain—Arch Street line	30,631.74	
	Waterbury—Baldwin street	4,822.35	
	New Britain—Plainville line	60,401.19	
	Milford—siding	1,562.78	
	CR&L Properties — various sales & exchanges	1,505.00	
	Bridgeport—various feeder cables	(Cr) 8,237.73	
	Bridgeport—Seaview Avenue Power Plant	40,649.65	

Exhibit W.

787

Accounting Year	Item	Debit	Credit
1933	Seymour—land and buildings		1,329.68
	Bridgeport—Barnum Avenue	61,469.18	
	Norwalk—Broad River	19,219.80	
	New Britain—portion Plainville-Lazy Lane line	(Cr) 1,233.08	
1934	Bridgeport—Gasoline storage facilities	9,021.67	
	Bridgeport—Shelton line	2,341.00	
1935	Stratford—sale of land		1,844.00
	Waterbury—sale of land		2,014.75
	Stratford—sale of land	(Cr) 1,577.24	
	Bridgeport—Congress Street carhouse	1,195.14	
	Totals—Eleven Years	$807,306.73	$24,731.57

788

P. R. Leete,
Valuation Engineer.

789

Tightly Bound

790

Notice of Appeal.

In the

DISTRICT COURT OF THE UNITED STATES

For the District of Connecticut.

In Proceedings for the Reorganization of a Railroad.

In the Matter of The New York, New Haven and Hartford Railroad Company, Debtor.	No. 16562

791

Notice is hereby given that Connecticut Railway and Lighting Company, petitioner in the above-entitled matter, hereby appeals to the Circuit Court of Appeals for the Second Circuit from Order No. 214-B herein, entitled Order to Correct and Revise Order No. 214-A on Claims of Connecticut Railway and Lighting Company, which Order No. 214-B was entered in this proceeding on September 13, 1939, striking out of said Order 214-A the allowance for

792

Claimant's damages from the rejection of the lease accruing from December 18, 1935 to June 30, 1937, and striking out the provision for liquidation of damages of the petitioner accruing up to the date of final hearing and which denies the claims of Connecticut Railway and Lighting Company, and from every part of said Order denying petitioner's claims.

Dated, September 26, 1939.

Emmet, Marvin & Martin,
Attorneys for Appellant,
Connecticut Railway & Lighting Company,
48 Wall Street,
New York, N. Y.

Memorandum of Decision on Claim of Connecticut Railway and Lighting Company. 793

To:

CLERK of the District Court of
the United States
For the District of Connecticut.

H. J. WELLS, ESQ., and JAMES GARFIELD, ESQ.,
Attys. for Appellees,
Howard S. Palmer, *et al.*,
Trustees of the Property of
The New York, New Haven &
Hartford R. R. Co., Debtor, 794
71 Meadow St., New Haven,
Connecticut.

Memorandum of Decision on Claim of Connecticut Railway and Lighting Company.

In the

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF CONNECTICUT. 795

IN PROCEEDINGS FOR THE REORGANIZATION OF A RAILROAD.

IN THE MATTER of THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Debtor.	No. 16562

In 1906, the New Haven Railroad, as tenant, leased from the Connecticut Railway and Lighting Company, as landlord, all the latter's property for a term of 999

796 *Memorandum of Decision on Claim of Connecticut Railway and Lighting Company.*

years at an annual rental (after 1914) of $1,400,000. Thereafter the portion of the leasehold covering the gas and electric properties was assigned to Connecticut Light and Power Company, subject to one-quarter of the rent. This part of the lease is not default, nor has the New Haven Railroad any further interest in it.

The balance of the demised properties, consisting of trolley street-car property, was retained by the New Haven and sublet to its subsidiary, The Connecticut Company, which operated them, subject to the balance of the
797 stipulated rent, i.e., three-quarters thereof: $1,050,000. This $1,050,000. was later reduced to $1,049,563.50 by a refunding operation so that, for all the period subsequent to the rejection of the lease on December 18, 1935, the stipulated annual rental is $1,049,563.50.

On December 18, 1935, the lease was rejected by the Trustees of the New Haven, who had been appointed by the District Court in proceedings brought pursuant to Section 77 of the Bankruptcy Act, and claimant duly filed its claim for damages.

On June 30, 1937, a hearing was held, after which
798 the court adjudicated the amount of damages and made an order fixing the amount of the claimant's claim. On appeal, the Circuit Court of Appeals affirmed this order in most respects, 95 Fed. (2nd) 483, 486, and an order on mandate (Order No. 214A in these proceedings) was entered by this court accordingly. But on further appeal, the Supreme Court held that the rule of damages applied below in ascertaining damages on account of the rejection of the lease was wrong; that the statute (Bankruptcy Act, Section 77(b); 11 U. S. C. A. Section 205) placed no limit on the damages provable for loss of future rents due to rejection; that claims for the loss of future rents were provable under the statute; that the case be remanded

to the District Court for further proceedings accordingly (83 U. S. Law Ed. 268).

The matter is again before this court, therefore, for the purpose of proving claimant's claim for loss of rents due to rejection of the lease on December 18, 1935. The measure of damages on this issue was the only question before the Supreme Court, and its judgment of reversal therefore is effective to reopen the order theretofore entered on the mandate of the Circuit Court of Appeals only in so far as that order applied a measure of damages found to be erroneous.

Order No. 214A, however, reserved for future hearing the liquidation of claimant's "damages for the breach of the tax-free covenant contained in the lease for the period from December 18, 1935 (when said lease was rejected) to date of final hearing." This was an issue not included in the appellate proceedings in the Supreme Court. The hearing of March 13, 1939, covered both these issues, and accordingly both will be dealt with in this memorandum.

Claim For Damages For The Rejection Of The Lease.

In the Supreme Court decision upon this claim it was held that the controlling measure of damages is "the present value of the rent reserved less the present rental value of the remainder of the term." The term of the lease was 999 years and at the time when the lease was rejected the unexpired term was 969 years.

In 1906, when the lease was executed, the demised properties consisted of street railways operated on rails by overhead trolley. By 1935, when the lease was rejected, the operation of the demised properties had been partly converted to bus operation. During this period,

802 the debtor through the Connecticut Company, its wholly owned subsidiary, owned other street railway properties, considerably greater in extent than the demised properties, which it operated together with the demised properties as part of a single system, without separate record in its accounting system for the operation of the demised premises.

Shortly after the institution of these proceedings in October 1935 and the rejection of claimant's lease in December, 1935, in pursuance to an order of court the debtor
803 began to keep separate records of the operation of the demised properties. These records are available for the period ending November 16, 1936, when the claimant, which in the meantime had assembled an operating organization, reentered and repossessed itself of the demised premises. Straightway upon its reentry the claimant wholly converted its operations from rail and trolley-car to bus and rubber, and this operation has been continued ever since.

PROOFS ON RENT RESERVED.

804 The claimant has proved that the stipulated annual rental of $1,049,563.50 discounted at 4% for a period of forty years from January 1, 1936, had a present value (as of January 1, 1936) of $20,773,773.01; and that the annual rental prorated over the period from December 18, 1935 (when the lease was rejected) to January 1, 1936, was $40,257.06. The claimant has offered no evidence, however, as to the present value of the stipulated rental for the balance of the term, viz., 969 years. Perhaps with some help from a mathematician I could take judicial notice of such a computation. But in the view which I take of the case, there is no need.

Memorandum of Decision on Claim of Connecticut Railway and Lighting Company.

805

PROOFS ON RENTAL VALUE.

The claimant's only proofs of rental value are confined to the prospective earnings of the demised properties; and its only proofs of such prospective earnings are its actual earnings for various periods all prior to January 1, 1939, upon the sole basis of which it asks the court to fix the future rental value of the demised properties, not however, for the entire unexpired term of 969 years, but instead for forty years only.

806

Thus claimant has offered evidence to prove that the present rental value of a term expiring in 1975 (instead of in the year A. D. 2905) would be (without taking into account the tax-free clause in the lease) $7,419,181.59 if the actual earnings for the period from July 1, 1937 to December 31, 1938 be used as the base. On this basis, claimant's damage for a forty-year term would be $13,354,591.42. Claimant presses this method of assessment upon the court on the ground that the base period was one during which the demised properties were wholly operated by bus.

807

But the claimant, recognizing apparently that an eighteen-month span of earnings was indeed a narrow base upon which to estimate earnings even for a forty-year term, further offered evidence to show that the present rental value of a forty-year term would be $7,867,297.51 if the actual earnings for the three calendar years 1936-1938 be used as the base. This basis, under which claimant's damage for a forty-year term would be $12,906,475.50, is propounded as an alternative method of assessment.

Similarly, the claimant has offered evidence that the present rental value of a forty-year term would be $9,737,181.81, if the earnings of the demised property (which,

808 prior to debtor's separate accounting for the demised premises beginning in 1935, have been ascertained by a process of reconstruction) for the ten years 1929-1938 be used as the base. On this basis claimant's damage for a forty-year term would be $11,036,591.20, which is also pressed as an alternative method of assessment.

And similarly, claimant has offered evidence to prove that the present rental value of a forty-year term would be $11,116,635.19 if the earnings of the demised property for the 14 years 1925-1938 be used as the base, in which 809 case claimant's damage for a forty-year term would be $9,657,137.82.

Thus, in short, claimant urges that the court should assess its damages upon some one of the four methods just described, selecting for the purpose that basis of the four which seems most appropriate.

All of the claimant's computations of present values are obtained by discounting future rents and future earnings at 4%, with annual pauses. My rulings presently to be stated in no respect turn upon a conclusion that this method and rate of discount is not proper and allowable upon the evidence.

810 I find further from the evidence as follows: The operating income (without deduction for federal income taxes) attributed to the demised properties from 1921 to 1938 was substantially as follows:

811

1921:	$330,000.	1930:	$670,000.
1922:	817,000.	1931:	504,000.
1923:	834,000.	1932:	78,000.
1924:	686,000.	1933:	168,000.
1925:	615,000.	1934:	106,000.
1926:	518,000.	1935:	217,000.
1927:	507,000.	1936:	246,000.
1928:	775,000.	1937:	176,000.
1929:	723,000.	1938:	122,000.[1]

Debtor's evidence further shows that prior to 1921 the operating income of the Connecticut Company systems, including the demised properties as an integral part thereof was as follows: 812

1907:	$1,631,261.	1914:	$2,341,862.
1908:	2,309,504.	1915:	2,246,606.
1909:	2,849,657.	1916:	2,610,855.
1910:	2,744,282.	1917:	1,628,832.
1911:	1,928,385.	1918:	1,285,816.
1912:	2,485,589.	1919:	1,274,930.
1913:	2,588,081.	1920:	14,660.[2]

[1] These figures (except for 1936-1938) are exclusive of certain controversial routes which were established during the tenancy of the New Haven and finally determined to constitute an addition to the demised premises. The operating income of these routes increased from about $6,000. in 1921 to $34,000. in 1929, since when it has declined to $21,000. in 1937. 813

[2] (a) In 1921 and for several years prior thereto the Connecticut Company was operated independently of the New Haven by trustees appointed by the District Court of the United States for the Southern District of New York in dissolution proceedings brought under the Anti-trust Act under a decree requiring said trustees before July 1, 1919, which date was extended to July 1, 1922, to sell the New Haven's shares in the Connecticut Company. Subsequently, the dissolution decree was modified and the control of the Connecticut Company was returned to the New Haven.

(b) In 1920 the competition between the Connecticut Company and unregulated private jitneys was at its peak. The earliest regulation of passenger transportation by motor bus in Connecticut was that contained in the Public Acts of that State in 1921. P. A. 1921, C. 77.

(c) While the trend of both the above items was obviously temporarily adverse to Connecticut Company earnings, the record contains no quantitative evidence on the effect of those factors.

814 Exhibit Y-4 shows the percentage of claimant's net operating revenue to the net operating revenues of the system for the years 1921 to 1937. These percentages range from a low of 16% to a high of 31%. The percentages, if applied to the figures for system operating income for 1907 to 1920 set forth above, may serve to give a rough indication of the range of operating income attributable to the demised properties from 1907 to 1920.

The above figures show nine comparatively prosperous
815 years from 1908 to 1916 for the system as a whole; likewise nine such years for the demised properties from 1922 to 1930. During the latter period the percentage of net operating revenues of the demised properties to the system ranged from 25% to 32%; it averaged about 29%. By applying that percentage to the system figures for the earlier period, the average annual operating income of the demised properties (before federal income taxes) is roughly indicated at about $740,000.

Similarly the "prosperous" period from 1922 to 1930 shows an average annual operating income of the demised premises (before federal income taxes) of about
816 $680,000.

Between these prosperous periods intervened six lean years from 1917 to 1922. And after 1930 we have eight years, in which the earnings of the demised premises have been far below those of the prosperous periods.

The foregoing figures are without federal income taxes. What these taxes for these years were, the record does not show.

The claimant, however, concedes that for purposes of computing future rental value of the term the prospective operating income of the demised property, to comply with the Supreme Court decision, must be increased by $206,742.06 annually, to cover earning power added to the

817

physical properties by the sinking fund ($157,028.31 annually) and by the termination of the lessee's obligation to include amortization payments in its stipulated rental ($49,713.75 annually).[3]

DISCUSSION AND HOLDINGS.

1. I hold that the earnings for the eighteen months of bus operation ending in December, 1938 is inadequate as a base for finding future rental value.

818

In 1936 when operation of the demised property was in substantial part by trolley, the net operating income was $246,000. In 1938, the first full calendar year of 100% bus operation, the earnings were only $121,000. There is no evidence to show whether this shrinkage was due to a general recession in business conditions or to an error in judgment in changing from trolley to bus operations. Either cause destroys the validity of this period as a base upon which damages may be computed. If the shrinkage was due to claimant's error of judgment, the resulting loss cannot justly be assessed against the debtor's estate. If due to a prevailing depression it may not fairly be used as a forecast of results to be expected for a long future term. The Supreme Court observed in its opinion upon my earlier adjudication of this claim, "Since insolvencies are more frequent in economic depressions and since, as a consequence, estimates of the rental value of the remainder of the term are given under subnormal business conditions, the difficulties are multiplied." The observation surely implies that earnings on the basis of subnormal conditions, if used at all in a de-

819

[3] The debtor claims that these additions to the prospective operating income should be somewhat larger. The contest between the parties over this item is moot under my view of the controlling issues.

820 termination of future earnings, must be corrected by other factors.

2. I hold that the earnings for the years 1936-1938 are inadequate as a base. During half of this period, operations were in substantial part by trolley. I agree with claimant's counsel that this period, as an experience period, is thereby "perturbed by irrelevant or inaccurate factors." Moreover, this period also was one of economic depression.

821

3. And I hold that all earlier periods concerning which there is evidence are unsuitable for use as experience periods. They are irrelevant in that they cover operation in large part by trolley. They are speculative in that there is no evidence from which the relative frequency of the fat years and the lean can be forecast.[4]

It is equally apparent that the earnings obtained throughout the nine-year high plateaux may prove about as far from correct as those taken from an intervening trough. If on such facts as appear here earnings are to be used as the base for a prediction, the proofs must
822 show some reasonable method for blending the results of the fat years with those of the lean years. But no such proofs are found in the record. Nor is there the slightest evidence to justify a straight line average as a proper base. Predictions on such scant data are not even "plausi-

---

[4] The Restatement of Contracts, Section 331, clearly contemplates that the lost profits of a business are recoverable only if the business was "well-established" and such that "on the basis of its past history, a reasonable prediction can be made as to its future." And "speculative profits are those the evidence of which is so meager or uncertain as to afford no reasonable basis for inference."

It may be that future rental values may in certain cases be established by other evidence (such perhaps as market value) than expected future earnings. But where a claimant seeks to establish future rental value by proof only of earnings, the rule of the Restatement relative to proof of future profits would seem to be applicable.

823

ble anticipations" which the Supreme Court has said are not enough. Especially is that so in a case such as this where after thirty years of trolley operation, the claimant itself after repossession wholly abandoned trolley operation for bus operation and on its brief urges that only results on the new basis (of eighteen months) are not "perturbed by irrelevant or inaccurate factors" resulting from superseded trolley operations.

In such a state of the record I cannot even embark upon the journey of assessment unless I treat claimant's failure to show a proper method for averaging the results of the past as a concession that earnings for the prosperous periods may be used as a basis for prediction. These earnings of about $700,000. annually, even when increased by the conceded allowance on account of the sinking fund earnings and cessation of amortization payments ($206,-742.06) and without deduction for federal income taxes, are still less than the reserved rental. Consequently, even on this basis claimant can still claim that, if future rental value be computed on the basis of past earnings alone, substantial damages have been demonstrated.

824

To justify such a process of assessment, the claimant quotes from my memorandum of decision upon the Old Colony claims entered February 4, 1938 (printed record, page 3939) wherein I said: "The net earnings of the property are always persuasive evidence of its rental value; in the absence of all other evidence they may be taken as conclusive evidence of rental value." But this observation, which incidentally was a part of a decision which the Supreme Court reversed, must be read in its context. Thus read, the observation if it has any validity must be confined to a case in which the task is to ascertain the rental value for a period of only a year or two already passed,—rather than for an unexpired term running long into the future.

825

826 *Memorandum of Decision on Claim of Connecticut Railway and Lighting Company.*

In asking the court to forecast future damages on the sole basis of past earnings, the claimant affirms:

> "The past is the only criterion of the future that there is; and the production of experts to relieve one from the pains of thought in this regard is not really useful. Generally, the longer the experience period upon which future estimates are based, the further into the future one is justified in going. But this is only true if the experience period is, so
827 far as can be told, similar to the future period which is being considered. If the data for the experience period are not accurate, or are based on opinion, or deal with a different method of operation (e.g., trolleys rather than busses), then the further into the past one goes the more inaccurate the criterion becomes. It is better to have a relatively short experience period which is accurate and appears to reflect the future than a longer one which is perturbed by irrelevant or inaccurate factors."

I quite agree that the bare opinion of one posing as
828 an expert on future rental value would be of little help to the court in connection with its present task. But on the other hand, it is conceivable that the court might have been considerably assisted by a broad, sound survey by an expert of demonstrated competence covering the field of passenger transportation by bus in the relevant territory and contiguous regions; including perhaps such factors as industrial and residential developments, past and future; the growth, volume and earnings of bus traffic, both in the relevant territory and similar territories; the existence and condition of competitive agencies; and the possibilities and effects of consolidation with other

829

combinations of capital in the general field. I cannot now say that any such survey would have sufficed as a sole base for the assessment of damages. I think, however, some such survey might have constituted a firmer base than anything contained in the record.

4. I hold, however, that even if claimant had been able to prove such a history or prospect of earnings for the demised premises as would support an assessment of damages for an unexpired term of, say, forty years, that proof standing alone would not necessarily be adequate to support an assessment for the unexpired term of 969 years which is the only term with which we are here concerned.

830

The claimant arbitrarily assumes that damages may properly be assessed as though the unexpired term were only forty years. It attempts to justify this position by suggesting that "for the purpose of solving the problem put by the Supreme Court," viz., the task of finding "the present rental value of the remainder of the term", the trial court may, in the absence of evidence adapted to prove the value of the remainder of the term substitute for the measure approved by the Supreme Court a different measure which the claimant can more easily satisfy. Thus it urges that the computations should not exceed "forty years for the same reason that firing data are not calculated beyond the known effective range of a field piece." The argument, to me, seems to include tacit admission that future damages on the only measure which the Supreme Court has approved, have not and cannot be proved.

831

Claimant's counsel further argues: "The nervous remarks about reasonable certainty in the opinion of the Supreme Court indicate that they have no confi-

832 dence that it is possible to produce evidence which will justify the award of damages based on the entire unexpired balance of the term. It may be possible to conclude that *some* damages will accrue to the end; but it will curtail discussion to assume that fifty years from now (January 1, 1939) is the limit which is dictated by common sense."

The fact that counsel here suggests fifty years as a practical limit upon the provability of damages, when his 833 proofs and final claim of damage rest upon a forty-year limit, self-imposed serves but to emphasize the inherent caprice of his position.

In any event, whether or not the Supreme Court was without confidence that the claimant could prove future damages according to the measure and standard which it clearly prescribed, this court is not at liberty to modify the approved measure to accommodate the exigencies of claimant's proofs. For when the Supreme Court emphasized the high standard of proof required and the inherent difficulty of complying therewith, it contemplated that non-compliance should result in disallowance, not 834 in a modification of standard and measure. The court said: "Only those damages susceptible of definite proof *should be allowed.*"

Even if the evidence sufficiently proved that for forty or fifty years the earnings of the demised property would be less than the rental reserved for that period, the remaining 925 years of the unexpired term cannot be ignored. During the last two decades we have seen a vast expansion of bus transportation on the highways to which the shrunken revenues of railroads and the widespread abandonment of trolley operations bear convincing testimony. It is also, I think, a matter of common knowledge that the trend of bus operation has

835

attracted large combinations of capital. It is not inconsistent with the meager evidence of the record that some such combination might discern in the demised properties, operated either separately or with the benefits resulting from a possible consolidation, an earning capacity for the unexpired term substantially greater than that to be anticipated in the more immediate future.

When the contemporary scene is shifting so fast there is no basis for the assumption implicit in claimant's position that a past experience of even thirty years of earnings has forecasting value for a period of over 900 years. To be sure, when the trend of obsolescence for transportation by trolley car began, it may be that street railway management for a time shrank from the responsibility and difficulties of retiring the capital investment in power houses, trolley wires and rails; that fresh combinations of capital utilized this period of hesitation to obtain a competitive foothold in the field of passenger transportation, thereby accelerating the period and process of obsolescence for the trolley car and reducing its revenues. And in the light of the past no one can say with confidence that the motor bus will escape the eventual obsolescence which overtook the horse-car and the trolley. Nevertheless, especially when once the painful process of downward capital readjustment involved in conversion from trolley to bus operation has been accomplished, there is no basis for assuming that the demised properties now devoted to passenger transportation by bus under efficient and forward-looking management, alert to adopt any future developments of the instruments of transportation which may in turn threaten the motor bus with obsolescence, will never throughout the term produce earnings greater than those to be expected in the next forty years or so.

836

837

To this the claimant objects that under public regulation its future earnings will be held in such relation to its

838 invested capital that inevitably its earnings will fall short of the rentals reserved in the lease.

But historically the function of rate regulation by the public authorities owes its existence to the monopolistic character of the agencies of public transportation. Nowadays it is common knowledge that bus companies, like the railroads, are in keen competition with the private automobile and in certain areas in competition with each other. Against such background one cannot forecast the effect of public regulation on future generations. Indeed, it is not

839 inconceivable that, in the course of generations, with the growing development of competition between transportation agencies the entire industry, at least with respect to matters of capital and earnings, may be absorbed into the competitive unregulated fields, notwithstanding strong contemporary trends to the contrary. Such a development over the generations would seem to mark a change in economic thought no more extreme than the change in social attitude toward prohibition occurring in the compass of half a generation.

But however that may be, who can say what claimant's invested capital will be 900 years hence? In less than a

840 generation we have seen the rattletrap jitneys which first challenged the trolleys yield to the more commodious and expensive busses into which the claimant now invites the public. I have no basis for holding that this trend has ended. It is a matter of common observation that many bus companies are providing commodious terminal facilities and a net-work of rest-rooms for their patrons. The claimant, too, is free so to expand. Moreover, there was nothing in the lease to prevent the lessee from expanding the frequency and the territorial dimensions of its routes. Indeed, this claim as originally presented included a controversy as to whether upon the repossession of the de-

841

mised property numerous routes which the lessee had added should remain with the lessee or should be returned to the claimant with the demised premises. Five of these routes I awarded to the claimant and the evidence herein (Ex. Y2) shows that the annual operating income from these routes alone increased from $6,000 in 1921 to $34,000 in 1928. The net effect of possible extensions to be accomplished for the remainder of the term is incalculable. Altogether, it is apparent that the future investment of capital in connection with the demised premises and consistently with the terms of the lease is unpredictable; that being so the possibility or even the likelihood that the public authorities will by rate regulation or otherwise restrict future income for its relationship to invested capital loses the significance attributed to it by the claimant.

842

Indeed the provisions of the lease whereby extensions accomplished by the lessee are deemed a part of the demised properties greatly increase the claimant's difficulties of proof.[5] Past experience has demonstrated that such extensions are too substantial to be neglected in estimating the value of the unexpired term. But the record contains no survey of the opportunities for further expansion upon the basis of which future income or values may be forecast.

843

The claimant seeks escape from its difficulties of proof by invoking the doctrine of *Monger* v. *Lutterloh*, 195 N. C. 274, 142 S. E. 12. The opinion in that case states that the burden is on a defendant who has breached a lease to show

[5] The lease provides: "And the Lessee further covenants that at its own first cost and expense it will enlarge and extend said property within the territorial limits of the towns where said property is now located, and that it will acquire, so far as practicable, necessary franchises, rights and powers in the name of the Lessor, for the purpose of enabling the Lessee to enlarge and extend, as aforesaid, and to carry on, preserve and develop the business, in such manner as shall at all times to the Lessee, acting in good faith, seem adapted to develop and safeguard the property, to promote and preserve its interests, and to extend its franchises and powers within said territorial limits."

844 matters in mitigation of damages; that in the absence of such evidence "prima facie the plaintiff would be entitled to recover the amount fixed by the terms of the lease."

If this means that in such a case as this, where there is a lack of evidence from which the rental value of the unexpired term can be found with such reasonable certainty as to satisfy the mind, the landlord having proved the reserved rental is entitled to damages in that amount and to the enjoyment of the demised properties as well, I cannot accept the doctrine as sound. Under such a doctrine I 845 should be compelled to allow as damages the entire rental for the unexpired term of 969 years,—an amount so vast as to exceed many-fold the entire value of the demised premises.[6] For here the debtor's evidence bearing on the rental value for the unexpired term consists of anticipations scarcely more plausible than those implicit in claimant's evidence; the evidence of claimant and debtor alike lacks that "reasonable certainty — — — which satisfies the mind," which is the standard of proof required under the Supreme Court opinion. And in every case of a rejected lease, the result of such doctrine will be this: the 846 longer the unexpired term, the greater will be the difficulties of proving the rental value thereof and consequently the better the position of the landlord who has already repossessed the demised premises to recover the full reserved rental without deduction. If such a rule were effective, damages would obviously have been allowed in the

[6] It was stipulated that as of December 31, 1938, the value of all claimant's property used in transportation, plus the value of all property not used in transportation which claimant had repossessed from the lessee, was $3,407,027. It will be noted that this figure represents a value after retirements involved in conversion from trolley to bus operations. The value of the demised properties as of the date when the lease was made does not appear, except that the report of the Connecticut Public Utilities Commission for the year 1937 shows $31,119,228.56 as the value (exclusive of betterments by the lessee) of the demised properties as of November 16, 1936 "being approximately the same as at August 1, 1906."

847

Crosstown Company's Appeal and the *Metropolitan Company's Appeal,* in the *Pennsylvania Steel Company* case. 198 Fed. 721, 756, 761. See also *In re Metropolitan Chain Stores,* 66 Fed. (2nd) 482.

The rule of the *Monger* case is perhaps most frequently asserted in employees' actions for damages resulting from breach of the contract of employment. See *Williston on Contracts* (1937 Edition) Vol. V, 1360. In Massachusetts as recently as 1908 the court recognized the rule as one generally prevailing elsewhere but also recognized the existence of a contrary minority doctrine; it found it unnecessary for purposes of that case to choose between the two rules but pointed out that it had refused to recognize the rule in cases other than actions by employees against their employers. *Maynard* v. *Royal Worcester Corset Co.,* 200 Mass. 1, 85 N. E. 877. In New York the application of the rule seems to be confined to employee cases, and the earlier statements of the rule (e. g., *Milage* v. *Woodward,* 78 N. E. 873, cited in *Monger* v. *Lutterloh*) have been refined, *Hollwedel* v. *Duffy-Mott Co.,* 263 N. Y. 95, 188 N. E. 266, until now, as Cardozo, C. J., put it, the contract wage "is only the prima measure. There is no fixed and certain obligation on the part of the master to respond in damages for that amount. The obligation of the master is merely to pay whatever damages have actually been suffered, and these exclude damages that a servant, acting reasonably, would have diminished or avoided. Proof of a prima facie case will charge the master with a duty of going forward with the evidence. This does not mean that he has the burden of proof in the strict sense, a burden that would require him to plead the matter to be proved." *McClelland* v. *Climax Hosiery Mills,* 252 N. Y. 347, 169 N. E. 605.

848

849

The rule as thus enunciated by Chief Justice Cardozo will not save the claimant. If the rule were applicable in

850 bankruptcy, and had received application in the hearing on this claim, the only apparent change in the record would have been that the claimant's exhibits which were designated by the series X would have been designated by the series Y, and vice versa as to the debtor's exhibits. This would not have served to impose upon the debtor a "fixed and certain obligation —— — to respond in damages" for the reserved rental. It would have left with me the very task with which I am now struggling, viz., to ascertain what damages, if any, have been proved with requisite cer-
851 tainy to "have actually been suffered."

I cannot myself see any basis in logic for the rule of *Monger* v. *Lutterloh* whether applied to the breach of a lease or to the breach of a contract of employment. In the one case, upon the breach the plaintiff landlord gets back his premises; in the other case the plaintiff employee gets back the availability of his services. The breached lease or contract evidences that the premises or the services once had value. Cf. Hubbs, J., in *McClelland* v. *Climax Hosiery Co.*, supra. Surely, if we are going to indulge in rigid presumptions, it is more reasonable to assume that value once existing persists in part, at least, even after the
852 breach, rather than to assume that all value has thereby become extinguished. The rule is sometimes explained by saying that it is more fitting that the burden of proof should be put upon the perpetrator of the breach rather than upon its victim. The explanation is too plausible; it would justify a general rule that in every case whether arising in tort or in contract, the burden of proof on the issue of damages is on the defendant.

The rule of *Monger* v. *Lutterloh*, and indeed the rule shifting the burden of proof in employee cases, seems not to have been recognized in the A. L. I. Restatement of Contracts. The Restatement provides a uniform treat-

853

ment for all cases in which avoidable harm is involved. Sec. 336.

Section 331 of the Restatement, however, deals with the degree of certainty required in establishing losses. The appended comment asserts that where "the experience of mankind is convincing that a substantial pecuniary loss has occurred—of such a character that the amount in money is incapable of proof—the defendant usually has reason to foresee this difficulty of proof and should not be allowed to profit by it. In such cases, it is reasonable to require a lesser degree of certainty as to the amount of the loss, leaving a greater degree of discretion to the jury, subject to the usual supervisory power of the court."

854

I have some doubt whether this doctrine or indeed the rule of *Monger* v. *Lutterloh* can logically be applied to a claim in bankruptcy. In bankruptcy the contest generally is not between the claimant and the bankrupt who breached the claim or lease; the contest rather is directed against other claimants whose position to insist upon a strict proof of a claim, which, if allowed, diminishes the quantum of their own participation, is perhaps superior to that of the bankrupt. Indeed, under the pending plan of reorganization proposed by the debtor herein, the common stock is wholly excluded from participation in the reorganized estate. The debtor's trustees resist the claim not for the benefit of the debtor, but rather for the benefit of its creditors.

855

However that may be, the rule of the Restatement is made to turn upon the foreseeability by the defendant of the difficulties of proof. This basis for a ruling is absent here. When the debtor entered into the lease, the only refuge for an insolvent railroad was in equity; and in equity a landlord was without remedy for a rejection of

856 his lease. Surely neither the debtor, nor indeed the multitude of its creditors who thereafter advanced millions in cash to the debtor's enterprise, could have foreseen that a generation later through an amendment to the Bankruptcy Act Congress would create a new cause of action.

Moreover, the pending claim does not fall within the scope of this comment. Congress did not intend that a loss "of such character that the amount in money is incapable of proof" should be allowed. Instead, as the
857 Supreme Court opinion on this claim points out, the language of Section 77 providing for the provability of claims for future rent was "intended to call emphatically to the attention of those administering the reorganization section the requirement that *only those damages susceptible of definite proof should be allowed.*" And the facts here more nearly resemble illustrations 1, 6 and 8 appended to subsection (1) of the Restatement (Sec. 331) than the illustration 2, for example. The case here resembles illustration 10, in that in accordance with the mandate the claimant has had opportunity of "giving evidence of the conditions and experience in the ——industry" of the
858 public transportation of passengers by bus in order to prove values which "are contingent and uncertain". But no "sufficient basis for the estimation" of such values has been laid.

5. I hold, therefore, that the burden was upon the claimant to prove its claimed damages in accordance with the measure of damages and the standards of proof enunciated in the Supreme Court decision; and that claimant has failed to sustain that burden.[7]

---

[7] The Supreme Court opinion refers to the English Bankruptcy Act of 1914 (495 Geo. V, c. 59) which in Sec. 30(8) treats as provable any claim which is "as to mode of violation, capable of being ascertained by fixed rules or as matter of opinion." It is interesting to note, however, that the same Act in

Memorandum of Decision on Claim of Connecticut Railway and Lighting Company.

859

It follows, of course, that under the mandate of the Supreme Court the outstanding order of this court entered upon the mandate of the Circuit Court of Appeals must be modified by striking out the allowance $1,263,412.92 for claimant's damages from the rejection of the lease accruing up to June 30, 1937 (the date of the original hearing); also the provision of said order for the liquidation of such damages up to the date of the final hearing. For these provisions of the order on mandate rested upon a measure of damage subsequently held by the Supreme Court to be erroneous. That court held that for the rejection of the lease the landlord by Section 77 of the Bankruptcy Act was given a cause of action, which, consistently with the fundamental law of contracts, was indivisible and comprehended damages for the entire unexpired term. Under Section 77 "leases were placed upon the same basis as executory contracts."

860

Section 30(6) provides: "If in the opinion of the Court, the value of the debt is incapable of being fairly estimated, the court may make an order to that effect, and thereupon the debt or liability shall, for the purposes of this Act, be deemed to be a debt not provable in bankruptcy." The provisions of Section 30 of the Bankruptcy Act, in so far as insolvent corporations are concerned, are incorporated into the Companies Act of 1929 (19 and 20, Geo. V, c. 23) Sections 261 and 262. I find no English case which suggests that upon the proofs submitted here an English court would hold the claim provable under Section 30(8), rather than non-provable under Section 30(6). In the leading case of *Hardy* v. *Fothergill*, (1888) L. R. 13 A. C. 358, the lease was for a term of 100 years, but the unexpired term was only eight years. In the most recent case, *James Smith and Sons* v. *Goodman*, 1936) Ch. 216, the lease was for only twenty-one years with an option in the lessee to terminate on six months' notice. Aside from *Hardy* v. *Fothergill*, I find no English case in which the lease exceeded twenty-one years. The English cases generally involved industrial or mercantile real estate for which presumably rental values had long been stable. Certainly the cases go on the belief that an ordinary knowledge and experience in dealing with the rental values of commercial real estate, coupled occasionally with some actuarial experience or assistance for the computation of life interests, is all the equipment needed to dispose of the problems involved in those cases. And certainly none of the English cases even suggests how the problems raised by the proofs here would be dealt with.

861

862 *Memorandum of Decision on Claim of Connecticut Railway and Lighting Company.*

CLAIMED DAMAGES FOR BREACH OF THE TAX-FREE COVENANT

Order No. 214A, being the order of this court entered September 30, 1938, upon the mandate of the Circuit Court of Appeals, reserved the liquidation of claimant's damages for the breach of the tax-free covenant in the lease for the period from December 18, 1935 until the date of final hearing which was held on March 13, 1939. In all other respects the claim for damage on the breach of this
863 covenant was finally disallowed. Thus the only item of claim for this breach which is now before me is that contained in the reservation of Order No. 214A, viz., for the period from December 1935 to March 1939.

Claimant now suggests that I follow the following process. 1. Take judicial notice of the various rates of corporate income tax effective between 1924 and 1938 ranging from 12½% to 16½% and strike an average, say at 14½%. 2. Ascertain the average operating income of the demised properties for a future period of some forty years on the basis of their past earnings. 3. Apply the hypothetical tax to the hypothetical future income, derived
864 as in (2) supra on the theory that the result will fairly represent the claimant's annual income tax for the next forty years. 4. Discount this hypothetical tax at 4% with annual pauses and assess the aggregate discounted value as damages for the breach of the tax-free covenant. Claimant's computations (which were excluded at the hearing) all based on a hypothetical tax rate of 16½% showed a result ranging from $540,000. (Ex. X2, B) on the assumption that future net operating income would be only $190,000 annually, to $1,074,887.90 (Ex. X2, D) on the assumption that future net operating income would be $383,000 annually.

865

6. I hold that future damages computed, as above, for breach of the tax-free covenant must be wholly disallowed.

The order on the mandate limited damages on this item to those accrued to date of final hearing, viz., March 13, 1939. If my order on mandate did not correctly reflect the holding of the Circuit Court of Appeals, the claimant's only remedy was by way of timely proceedings directed to a correction of the order on mandate.

Apart from the fact that the claim for "future" damages for this breach has thus become *res adjudicata,* the basis now advanced for future damages is wholly speculative. There is no evidence, and necessarily can be none, from which the future tax rate can be ascertained. Claimant's position tacitly concedes that an ascertainment of income taxes for the years following 1975 would be speculative. There is no evidence to support a differentiation between such taxes and those accruing prior to 1975. And of course the considerations set forth above which led me to hold that the record was without basis for an ascertainment for future income requires the same holding with respect to future income taxes. The holding is required by the rule of *Paris* v. *Remington Rand,* 101 Fed. (2nd) 64, 68.

866

867

However, claimant has proved that it became liable for a federal income tax of $5,024.11 for the year 1936, which tax was attributable to its transportation properties (Ex. X4). This was conceded by debtor on brief. The same exhibit disclosed a similar liability in the amount of $24,013.30 for the year 1938. The allowability of this item was not conceded by the debtor.

To be sure, the evidence does not show that this tax was actually paid by the claimant. For the evidence was taken on the very day (March 15, 1939) when claimant was expecting to file its tax return. But the claimant's

868 witness who appeared thoroughly familiar with claimant's books of account and the detail relevant to its tax return testified unequivocally (Trans. 138) that the amount represented the 1938 income tax "applicable to the revenue from operations of the transportation property" of the claimant. There is no contention that claimant owned other transportation properties than those included in the lease. Surely the mere fact that the witness testified (Trans. 118) that he didn't have available on the witness stand the
869 amount of tax attributable to claimant's power properties, now held by the Connecticut Light and Power Company under lease, is a matter of no controlling significance.

7. I hold, therefore, that claim for breach of the tax-free covenant may be allowed in the amount of $5,024.11 for the year 1936 and $24,013.30 for the year 1938; total $29,037.41.

An order to correct and revise Order 214A in accordance with the foregoing may be submitted on notice.

Dated at New Haven this 21st day of June, 1939.

870 C. C. HINCKS,
United States District Judge.

Stipulation as to Record.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT.

IN PROCEEDINGS FOR THE REORGANIZATION OF A RAILROAD.

IN THE MATTER
OF
THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Debtor.

IT IS HEREBY STIPULATED AND AGREED that the foregoing is a true transcript of the record of said District Court in the above entitled matter as agreed upon by the parties.

Dated: New York, N. Y., November 6, 1939.

EMMET, MARVIN & MARTIN,
Attorneys for Connecticut Railway and Lighting Company,
Appellant

H. J. WELLS,
Attorney for Howard S. Palmer, James Lee Loomis and Henry B. Sawyer, as Trustees of the Property of The New York, New Haven and Hartford Railroad Company, Debtor,
Appellees

874 **Clerk's Certificate**

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT.

IN PROCEEDINGS FOR THE REORGANIZATION OF A RAILROAD.

IN THE MATTER
OF
875 THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Debtor.

UNITED STATES OF AMERICA
District of Connecticut } ss.:

I, CHARLES E. PICKETT, Clerk of the District Court of the United States of America, for the District of Connecticut, DO HEREBY CERTIFY that the foregoing is a correct transcript of the record of the said District Court in the
876 above entitled matter as agreed on by the parties.

IN TESTIMONY WHEREOF I have caused the seal of the said Court to be hereunto affixed at the City of New Haven, in the District of Connecticut, this 6th day of November, in the year of our Lord One Thousand Nine Hundred and Thirty-Nine and of the Independence of the United States the One Hundred and Sixty-fourth.

CHARLES E. PICKETT,
(SEAL) Clerk.

Opinion, Circuit Court of Appeals.

877

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

No. 201—October Term, 1939.

(Argued January 23, 1940 Decided February 13, 1940.)

CONNECTICUT RAILWAY AND LIGHTING COMPANY,
Appellant,

—against— 878

HOWARD S. PALMER, JAMES LEE LOOMIS and HENRY B. SAWYER, Trustees of New York, New Haven and Hartford Railroad Company, in reorganization,
Appellees.

Appeal from the District Court of the United States for the District of Connecticut.

Proceeding to reorganize the New York, New Haven & Hartford Railroad Company under section 77 of the Bankruptcy Act, in which Howard S. Palmer and others were appointed trustees. Connecticut Railway and Lighting Company filed a claim against the debtor. From an order allowing the claim at a reduced amount, the claimant appeals. 879

Reversed.

Before—SWAN, CLARK and PATTERSON, *Circuit Judges.*

880 EMMET, MARVIN & MARTIN (George W. Martin, of counsel), for appellant.

HERMON J. WELLS and JAMES GARFIELD, for appellees.

ROBERT G. DODGE and TALCOTT M. BANKS, JR., *amici curiae.*

PATTERSON, *Circuit Judge.*

The claim is for damages on rejection of a lease by a railroad in course of reorganization under section 77 of the Bankruptcy Act. The claim has already been con-
881 sidered by this court and by the Supreme Court, and is here again after a second trial in the district court.

The claimant leased a street railway system to the New Haven for a 999 year term beginning in 1906. The agreed rent was $1,049,563.50 a year, and the New Haven was also to pay taxes on the lessor's income from the property. In October 1935, the New Haven filed petition for reorganization under section 77, and trustees were appointed. On December 18, 1935 the New Haven trustees rejected the lease as unprofitable. The claimant filed claim for damages caused by the rejection. The district
882 court allowed the claim to the extent of damages accrued to the date of hearing in June 1937, some $1,260,000, and gave leave to prove damages accruing to the time of a later hearing. On appeal this court held that the claimant should also have been given an allowance on the tax covenant; in other respects the award was affirmed. The claimant took the case to the Supreme Court, on the point that the lower courts had erred in limiting the claimant to damages accrued at the time of a hearing. The Supreme Court sustained the claimant's position. *Connecticut Railway & Lighting Co.* v. *Palmer,* 305 U. S. 493.

The measure of damages on rejection of a lease by a debtor under section 77, it was held, was the one generally applied by courts on repudiation of lease by a lessee—agreed rent for the balance of the term less rental value for the same period, both sums discounted to present worth. This measure of course includes prospective damages. The court went on to say that only such damages as might be proved to reasonable certainty were allowable, and that the difficulties in the way of proof were appreciated. Mention was made of the factors that uncertainty grew greater as the term lengthened, that it was harder to fix rental value of a street railway than rental value of a store, and that rejection of lease at a time of subnormal business conditions introduced further difficulties. The case was sent back for further proceedings. 883 884

On second trial in the district court in March 1939, the claimant sought to prove damages for the first 40 years after rejection of the lease. It conceded that for the 900 odd years beyond 1975 the damages were too vague to be estimated. As to the 40 years the claimant offered tabulations to show damages for each year to 1975. The present value of the agreed rent to 1975, at $1,049,563.50 a year discounted at four percent, came to about $20,000,000. The rental value was made up of interest from sinking fund, payments to sinking fund and operating income from the property. Only the last item presented difficulties. The operating income for 1936, 1937 and 1938, the first three years after rejection of the lease, was known; the results for those years, on the difference between agreed rent and rental value, showed damages of $1,838,485.35 already accrued at the time of the trial. For estimate of operating income beyond 1938 the claimant relied on past history of operating 885

886 income and offered alternative bases, differing in the number of past years taken as experience for averaging income. One basis was the average annual operating income from July 1937 to December 1938, inclusive; this period, while covering only 18 months, was offered as a measure because it was the period of 100 pereent bus operation, the present method of carrying passengers. A second basis was the average over 1936-1938, three years, that being the period of separate operation of the property. A third basis was the average over 1929-1938, an experience of ten years. A fourth basis took the average of 14 years, 1925-1938. On the alternative
887 bases the present rental value for the 40 years ranged from $7,000,000 to $11,000,000. The claim for damages, the difference between present worth of agreed rent and present worth of rental value for 40 years, thus varied from $13,000,000 to $9,000,000, according to the experience taken in estimating annual income beyond 1938.

The district judge rejected all the past experiences tendered by the claimant as measures for estimating future earnings,—the 18 months because the time covered was one of sub-normal business activity, the three years because of the same factor and also because a
888 substantial part of the operation for half of the period was by trolley, the ten years and the 14 years because they included years when a large part of the operation was by trolley and also because it was thought that the frequency of good times and hard times reflected by these periods might not be duplicated in the future. The judge held further that even if the claimant proved enough to support an assessment of damages for part of the unexpired term, its inability to prove what the damages would be over the entire 999 years was fatal to the claim. He thought that the Supreme Court had laid stress

on a high standard of proof, that no one could say what loss, if any, the lessor would sustain over the whole term of 969 years, and that he could not treat the lease as one for any shorter period. He therefore felt impelled to dismiss the claim, both as to damages accrued at the time of the hearing and as to damages estimated to accrue in future years. The only item allowed was a small one of $29,037.41 for income taxes accrued in 1936-1938 inclusive; this was allowed because it was provided for in the order entered on mandate from this court after the earlier appeal, an order which was viewed as a binding adjudication. 889

It goes without saying that damages for 969 years cannot be imagined, much less proved. The remainder of the lease covers a span longer than from the battle of Hastings to the present day. To try to forecast events for even a tenth of that futurity would appall the boldest prophet. It does not follow that the claimant should get no damages. For purposes of the age in which we live, we know that rejection of the lease caused a severe loss to the claimant. The lease was ruinous to the New Haven from the outset, and highly advantageous to the claimant. Year after year the agreed rent was greater than earnings of the leased property, greater by a wide margin. When the New Haven went into reorganization the trustees lost no time in disclaiming the lease as unprofitable. Since then the judgment of the trustees in disclaiming has been vindicated; earnings in the three years between disclaimer and trial have been less than half the agreed rent. With such a history we are reasonably sure that the agreed rent will continue for some years to exceed the earnings of the property. Beyond those years the outlook is too uncertain. There is presently no cause to believe that earnings will be better 890 891

892 in the distant years; for all that is known, the existing condition will continue indefinitely. The burden of proof, however, is on the claimant, and the uncertainties in the way of appraising earnings in the more distant years are too great. While the measure of a lessor's damages on rejection of lease is the agreed rent for the balance of the term less rental value for the same period, with both amounts discounted to present worth, a lessor may recover only so much of his damages as he is able to establish with reasonable certainty. In effect, the law for purposes of damages treats a lease with 969 more years to run as if it were only for a term within the reach of fairly
893 definite forecast; the unpredictable stretch beyond is disregarded. See *Old Colony R. Co.* v. *New York, New Haven & Hartford R. Co.*, 98 F. 2d, 670, 672 (C. C. A. 2). In cases where recovery of prospective damages on breach of contract is demanded, the plaintiff is not called on to prove to a dead certainty that he will suffer a loss from the defendant's wrong. Reasonable expectation of loss is all that can generally be proved. Williston on Contracts (Rev. Ed.), section 1346. See also *Hetzel* v. *Baltimore & Ohio R. Co.*, 169 U. S. 26, 38. Similarly, it does not matter that the total extent or precise amount
894 of the harm done is not susceptible of proof. *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U. S. 359; *Wakeman* v. *Wheeler & Wilson Mfg. Co.*, 101 N. Y. 205. "The law will make the best appraisal that it can, summoning to its service whatever aids it can command." *Sinclair Refining Co.* v. *Jenkins Petroleum Co.*, 289 U. S. 689, 697. It was error to hold that the inability of the claimant to prove damages over the entire 969 years sufficed to defeat the claim.

It follows that the district judge should have allowed at least the damages accrued prior to trial. To that

extent there was no element of speculation or uncertainty. 895
See *Greenberg* v. *Paramount Publix Corporation,* 85 F. 2d, 42, 45 (C. C. A. 2). As to damages to accrue in the future, we think that the judge was unduly critical of the evidence offered by the claimant. The claimant showed what the past earnings of the system had been, and evidence of past earnings in an established business is recognized as a substantial basis for estimating future earnings. *Anvil Mining Co.* v. *Humble,* 153 U. S. 540; *Eastman Kodak Co.* v. *Southern Photo Materials Co., supra; Story Parchment Co.* v. *Paterson Parchment Paper Co.,* 282 U. S. 555; Williston on Contracts (Rev. Ed.), section 1346A. Of the periods of past earnings 896
tendered by the claimant, that covering the 14 years prior to the time of the trial furnished a more reliable indication of future earnings than any of the others. It had the great merit of covering ups as well as downs in general economic conditions, which the shorter periods did not do. True, it included some years when a large part of the system was operated by trolleys. But the business in general character was the same as now, the carriage of passengers in cities and on relatively short runs; and we may take it, in the absence of evidence the other way, that the operating officers understood their 897
business and were using the most efficient and economical means of carrying passengers at the various times within the period, changing from trolley to bus only as conditions warranted. So the average annual earnings for the 14 year period preceding the trial were enough to serve as an approximate measure of earnings for some years to come. For how many years? Any selection may seem somewhat arbitrary; whatever the number of years taken, a critic may ask why one year less or one year more was not taken. Obviously the predictable

898 period varies in particular cases according to the stability of the business and other elements. In the present case the evidence suffices for exercise of an informed and reasoned judgment on the probable earnings in the future. Having in mind the character of the property, the territory served, the history of operations down to the time of the trial, the general economic conditions under which past operations have been conducted, and the other factors in the case, we conclude that performance of the property for eight years beyond 1938 was predictable with a fair degree of certainty. This will allow the claimant dam-
899 ages for eleven years subsequent to rejection of the lease, the three years prior to trial for which damages are known and eight more years for which damages are estimated according to past experience for 14 years. The difference between agreed rent and rental value on this basis, discounted to present worth at the time of rejection, amounts to $4,411,837.61. The claim for damages on rejection of lease should have been allowed in that amount.

The court below thought that the Supreme Court on the former appeal had emphasized a high requirement of proof. As we see it, the Supreme Court did no more
900 than lay down the standard usual in considering prospective damages, the rule of reasonable certainty. See Restatement of Contracts, section 331. We read the opinion as a caution against an award of damages on anything like a 969 year basis.

It remains to consider the damages for breach of the income tax covenant. The order entered on mandate from this court after the first appeal was not a binding determination of the claimant's rights. The matter of damages on rejection of the lease was then pending before the Supreme Court, and the claim for breach of the

tax covenant after rejection was part of the asserted damages. The claimant was not obliged to take another appeal from the formal order on mandate in order to save its rights. The measure of damages for breach of the covenant is the aggregate of income taxes payable by the claimant on its earnings over a period equivalent to the remainder of the lease, these amounts to be discounted to present worth. Williston on Contracts (Rev. Ed.), section 1413. Here again, however, the requirement of reasonable certainty in determining damages cuts across the measure otherwise allowable. In respect to the tax liability which accrued against the claimant on its income for the years 1936, 1937 and 1938, the amount was liquidated at the time of trial. It was proper for the district court to allow $29,037.41 for the taxes in those years. As to taxes for years in the future, there were uncertainties too serious to permit an assessment of damages. The earnings of the property could have been estimated, as we have said above, for eight more years with approximate accuracy. But the rate of tax for the future was a factor which the district court could not take for granted. Moreover, the experience over the three years prior to trial made it plain that the claimant's income tax liability was not a mere matter of taking the tax percentage of operating income. In 1937, for example, there was operating income of $179,000, but no income tax. We conclude, therefore, that the claimant has no grievance over the disallowance of the claim for income taxes beyond the amount of $29,037.41.

901

902

903

The order appealed from will be reversed, with direction to allow the claim in the amount of $4,411,837.61, in addition to the $29,037.41 already allowed.

Reversed.

Order for Mandate.

904

UNITED STATES CIRCUIT COURT OF APPEALS,

SECOND CIRCUIT.

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 2nd day of March, one thousand nine hundred and forty.

Present—HON. THOMAS W. SWAN,
" CHARLES E. CLARK,
" ROBERT P. PATTERSON, *Circuit Judges.*

905

In the Matter
of
NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Debtor,

CONNECTICUT RAILWAY AND LIGHTING CO.,
Appellant.

906

Appeal from the District Court of the United States for the District of Connecticut.

This cause came on to be heard on the transcript of record from the District Court of the United States for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed with costs and cause remanded with directions to allow the claim in the

amount of $4,411,837.61 in addition to the $29,037.41 907
already allowed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

D. E. ROBERTS,
Clerk.

by A. M. BELL,
Deputy Clerk

(Back) 908

UNITED STATES CIRCUIT COURT OF APPEALS,

SECOND CIRCUIT.

In re

NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO.

CONNECTICUT RAILWAY & LIGHTING CO.,
Appellant.

909

ORDER FOR MANDATE.

United States Circuit Court of Appeals
Second Circuit
Filed Mar 2, 1940
D. E. Roberts, Clerk

Clerk's Certificate.

910

UNITED STATES OF AMERICA,

SOUTHERN DISTRICT OF NEW YORK.

I, D. E. ROBERTS, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 303, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of

In the Matter

of

911

NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Debtor,

CONNECTICUT RAILWAY AND LIGHTING CO.,

Appellant,

as the same remain of record and on file in my office.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this sixteenth day of March, in the year of our

912

Lord one thousand nine hundred and forty, and of the Independence of the said United States the one hundred and sixty-fourth.

D. E. ROBERTS,

Clerk.

(Seal)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 22, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Blank Page

FILE COPY

Office Supreme Court, U. S.
FILED
MAR 29 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1939.

No. 38

HOWARD S. PALMER, JAMES LEE LOOMIS and HENRY B. SAWYER, Trustees of the Property of The New York, New Haven and Hartford Railroad Company, Debtor,

Petitioners,

—against—

CONNECTICUT RAILWAY & LIGHTING COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petition for Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit.

JAMES GARFIELD,
HOUSTON J. WARE,
Attorneys for Petitioners.

March 25, 1940.

Rand Corporation, Washington, D. C.

Blank Page

INDEX.

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statute Involved	2
Statement	3
Specification of Errors	4
Reason for Granting the Writ	4
I—The Character of the Evidence	5
II—As to the Measure of Damages	9
Conclusion	12

TABLE OF CASES CITED:

Connecticut Railway & Lighting Company v. *Palmer* 305 U. S. 493 ..... 2, 3, 5, 9, 10*n*, 11

Kuehner v. *Irving Trust Company*, 299 U. S. 445 11

Old Colony Railroad Co. v. *New York, New Haven & Hartford Railroad Co.*, 98 F. (2d) 670, 672 ..... 10*n*

Palmer v. *Palmer*, 305 U. S. 578 ..... 10*n*

Pennsylvania Steel Company v. *New York City Street Railway Company*, 198 Fed. 721, 759 11

Wise Shoes, Inc., In re, 2 F. Supp. 521, affirmed without opinion, 64 F. (2d) 1023 ..... 10*n*

OTHER AUTHORITIES CITED:

Judicial Code as amended by the Act of February 13, 1925:
Section 240(a) 2

Bankruptcy Act as amended:
Section 25(c) 2

Bankruptcy Act (11 U. S. C. A., Section 205):
Section 77 ..... 2, 4

Blank Page

IN THE

Supreme Court of the United States

October Term, 1939.

No.

HOWARD S. PALMER, JAMES LEE LOOMIS and HENRY B. SAWYER, Trustees of the Property of The New York, New Haven and Hartford Railroad Company, Debtor,

Petitioners,

—against—

CONNECTICUT RAILWAY & LIGHTING COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

The undersigned on behalf of the above-named petitioners pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered on February 13, 1940 reversing the decision of the District Court of the United States for the District of Connecticut.

Opinions Below.

The opinions of the courts below have not yet been officially reported. They will be found at pages 265-290 and pages 293-301 of the Record.

Jurisdiction.

The order for mandate was entered on March 2, 1940. Jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, and Section 25(c) of the Bankruptcy Act as amended.

Questions Presented.

In adjudicating a landlord's claim for damages for rejection of a lease in the reorganization of a railroad under Section 77 of the Bankruptcy Act, as interpreted by this Court in *Connecticut Railway & Lighting Company* v. *Palmer* (305 U. S. 493), may the Circuit Court of Appeals properly

(1) allow damages on the basis of evidence which the trial court has expressly held inadequate to establish future rental value?

(2) allow damages for a portion of the unexpired term of the lease and disregard the balance of the term?

Statute Involved.

The statute involved is Section 77 of the Bankruptcy Act (11 U. S. C. A., Section 205), the pertinent provision of which is,

> "* * * In case an executory contract or unexpired lease of property shall be rejected, * * * any person injured by such * * * rejection shall for all purposes of this section be deemed to be a creditor of the debtor to the extent of the

actual damage or injury determined in accordance with principles obtaining in equity proceedings * * *."

Statement.

In 1906 the respondent leased to the predecessor of The New York, New Haven and Hartford Railroad Company certain street railway property in several towns in Connecticut for 999 years (R. 5-30, 265). On October 23, 1935 the New Haven filed a petition for reorganization under Section 77 of the Bankruptcy Act (R. 1). The petitioners are the trustees of its property appointed by the Bankruptcy Court. On December 18, 1935 the trustees rejected the lease (R. 266) and on November 16, 1935, respondent repossessed its properties (R. 268). Respondent duly filed a proof of various claims including one for damages for rejection of the lease (R. 266). On that claim the lower courts held respondent entitled to recover the difference between the rent reserved and the earnings of the property from rejection until final hearing. This Court on certiorari reversed the lower courts' decisions and remanded the case to the District Court

> "for further proceedings in accordance with the order and opinion of the Circuit Court of Appeals as herein modified and of this Court." (*Connecticut Railway & Lighting Co.* v. *Palmer*, 305 U. S. 493, 506.)

Further hearings were held before the District Court in March, 1939 (R. 3). On June 21, 1939, that court rendered a decision (R. 265-290) and on September 13, 1939 entered an order (R. 54-55) in

which it disallowed the entire claim for damages for rejection of the lease on the ground that the respondent had failed to prove damages in the manner required by the opinion of this Court.*

Respondent again appealed and the appeal was argued on January 23, 1940 (R. 293). The Circuit Court of Appeals on February 13, 1940, reversed the decision of the District Court and allowed damages for rejection of the lease in the amount of $4,411,837.61 (R. 293-301).

Specification of Errors.

The Circuit Court of Appeals erred:

1. In awarding damages on evidence expressly held by the trial court to be "inadequate" and "unsuitable" to prove them.

2. In awarding damages for a portion of the unexpired term of the lease and disregarding the balance thereof.

Reason for Granting the Writ.

The Circuit Court of Appeals "decided a federal question in a way probably in conflict with applicable decisions of this court" when it allowed damages under Section 77 of the Bankruptcy Act on the basis of evidence which failed to meet the requirements of that Section as interpreted by this Court and in a measure different from that which this Court has held is prescribed therein.

---

* The only other issue at the second trial before the District Court arose out of the lease covenant to pay taxes. The decision on that matter was affirmed by the Circuit Court of Appeals and is not now questioned.

I.

The Character of the Evidence.

This Court said:

> "* * * only those damages susceptible of definite proof should be allowed" (305 U. S., p. 502).
>
> "The difficulties of proof are well recognized * * *. 'Testimony as to present rental value * * * partakes largely of the character of prophecy' * * *" (305 U. S., pp. 504, 5).
>
> "Judges in equitable proceedings will have the advantage of evidence in applying the usual rules as to the measure of damages. It is well understood that such evidence must show damages to reasonable certainty. Mere 'plausible anticipation' does not merit consideration nor are flights into the realm of pure speculation entitled to be treated as evidence. The determination of the amount to be allowed as the damage will be based on evidence which satisfies the mind" (305 U. S., p. 505).

Respondent completely failed to comply with this admonition as to the character of the evidence required to justify allowance of damages for loss of future rents. It made no attempt to show the probable rental value of the demised property. It did not even seek the opinion of any one familiar with the street railway business as to what its property would be likely to be worth. Its counsel said:

> "The past is the only criterion of the future that there is; and the production of experts to relieve one from the pains of thought in this regard is not really useful" (R. 276).

Even as to "the past" its showing was limited to earnings of the property for several recent periods which its counsel admitted were unduly brief or were "perturbed by irrelevant or inaccurate factors", and which the District Court held were "inadequate as a base for finding future rental value", "unsuitable for use as experience periods", "irrelevant", "speculative", "not even 'plausible anticipation'" (R. 273-5).

The record being thus lacking in "evidence which satisfies the mind", the court denied recovery for failure of proof.*

Respondent's attitude as exhibited at the second trial before the District Court seemed to indicate that it did not believe this Court meant what it said regarding the character of evidence required to prove damages. Its counsel said that:

> "The nervous remarks about reasonable certainty in the opinion of the Supreme Court indicate that they have no confidence that it is possible to produce evidence which will justify the award of damages based on the entire unexpired balance of the term" (R. 277-278).

His so-called evidence was submitted on the theory that the Trial Judge as "the trier of fact" would have to select, without the benefit of any evidence as to the

---

* "In such a state of the record I cannot even embark upon the journey of assessment" (R. 275).

"* * *. some such survey (by an expert) might have constituted a firmer base than anything contained in the record" (R. 277).

"the evidence of claimant and debtor alike lacks that 'reasonable certainty * * * which satisfies the mind,' which is the standard of proof required under the Supreme Court opinion" (R. 282).

future, what past earnings would seem to him most likely to represent future conditions and to decide how far into the future it would be proper to project those earnings.

> "I propose to submit a whole series of ratios and a whole series of periods, so that the court can choose whatever he wants, whatever he thinks fair." (R. 109).

And again,

> "I am not making forecasts. I am leaving it to the Court to make them" (R. 139).

In other words, respondent assumed the question at issue, namely, that it had been damaged and left it to the Court as to a jury to figure out the amount of the damage. Small wonder that the Court held that there was a failure of proof of damages.

This finding of failure of proof was not directed only to damages for the entire unexpired term. It applied equally to *any* future period. Respondent had asked the court to allow recovery for any number of years up to forty or fifty. In disallowing damages the court said:

> "I hold, however, that even if claimant had been able to prove such a history or prospect of earnings for the demised premises as would support an assessment of damages for an unexpired term of, say, forty years that proof standing alone would not necessarily be adequate to support an assessment for the unexpired term of 969 years * * *" (R. 277).

The inference is clear. The proof was insufficient to establish a loss for any term, whether 969 years or forty or any other.

The Circuit Court of Appeals completely disregarded the trial judge's findings as to the inadequacy of the evidence to establish any future loss. It treated his decision as though the refusal to split the unexpired term necessarily vitiated the disallowance of damages and made immaterial the findings as to failure of proof.

We shall discuss hereinafter the ruling of the Circuit Court of Appeals that the lease might be treated as though it had been for a different period from that for which the parties made it. Here we wish to point out that even if that could properly be done the record *in this case* fails to prove damages for *any* future period. Disregarding a portion of the future term will not save respondent because it did not prove damages for any part of that term.

In discussing the proof the Circuit Court of Appeals called the trial judge "unduly critical" of respondent's evidence (R. 299), and itself selected from among the several bases which the lower court had held "inadequate" that which in its judgment "furnished a more reliable indication of future earnings than any of the others" (R. 299). This basis it found "had the great merit of covering ups as well as downs in general economic conditions", although admittedly it "included some years when a large part of the system was operated by trolleys" (R. 299). The evidence thus adopted by the Circuit Court of Appeals is the same evidence which the District Court called "unsuitable", "irrelevant", and "speculative" (R. 274).

This Court required that damages should not be awarded except on the basis of "evidence which satisfies the mind". Clearly, it is the mind of the trial court rather than the mind of the Appellate Court to

which this Court referred. If there is a difference of opinion the Court which saw the witnesses and heard their testimony and which had the entire record presented to it is the court whose mind must be satisfied. We respectfully submit that the Circuit Court of Appeals misinterpreted this Court's opinion in substituting its judgment as to the adequacy of the evidence for that of the District Court.

II.

As to the Measure of Damages.

This Court said:

> "* * * the measure (is) the present value of the rent reserved less the present rental value of the remainder of the term * * *. Here there is a remainder of 969 years" (305 U. S. pp. 504-505).

The District Court construed that language to mean that

> "* * * the unexpired term of 969 years * * * is the only term with which we are here concerned" (R. 277),

and that the

> "* * * cause of action * * * was indivisible and comprehended damages for the entire unexpired term" (R. 287).

The Circuit Court of Appeals disagreed. That respondent showed that it had lost money during the three years from rejection to hearing, that the earnings of the property had for some years been less than the rent, and that the New Haven Trustees had "lost

no time in disclaiming the lease as unprofitable" were taken as proof that "the agreed rent will continue for some years to exceed the earnings of the property". Because "the uncertainties in the way of appraising earnings in the more distant years" were considered too great, it was held that damages may be awarded for the first few years when "we are reasonably sure that the agreed rent will * * * exceed the earnings of the property" and "the unpredictable stretch beyond is disregarded" (R. 297-8).*

In this we submit the Circuit Court of Appeals erred. The question whether a landlord will be injured by rejection of his lease depends not only on what happens during the first few years after rejection, but on the entire balance of the term. It is quite conceivable, as the District Court pointed out (R. 278-9), that respondent may in the future actually make more money out of its property under bus operation than it would have received as rent under the lease to the New Haven. To assume that it has been injured by the rejection necessarily assumes that earnings will be less than the rent for the entire period. Instead of requiring proof of "actual damage or injury" as required by the statute the Circuit Court of Appeals holds that possible offsetting profits in the future may be disregarded and present loss may be assumed to measure ultimate injury. To permit re-

* The only authority cited for such disregard of part of the term is *Old Colony Railroad Co.* v. *New York, New Haven & Hartford Railroad Co.*, 98 F. (2d) 670, 672, which case was reversed by this Court in *Palmer* v. *Palmer* (305 U. S. 578), and remanded to the District Court for further proceedings in conformity with the opinion of this Court in the *Connecticut Railway & Lighting Company* case. And the reasoning of Judge Patterson, who wrote the present opinion, is inconsistent with that of the same Judge in 1932, *In re Wise Shoes, Inc.*, 2 F. Supp. 521, affirmed without opinion 64 F. (2d) 1023 (Judges Learned Hand, Augustus Hand and Swan).

covery for the 11 years after rejection and disregard the balance of the term would be to treat the lease as though it had originally been made for 40 years (1906 to 1946) instead of for 999 years. We submit that the courts have no power to remake contracts for the parties in this manner, and that this Court's opinion does not warrant such an interpretation.

This Court called attention to the difficulties of proving damages in the case of long-term leases. Commenting on its decision in *Kuehner* v. *Irving Trust Company* (299 U. S. 445), it said

> "the uncertainty as to the loss entailed by abrogation of leases * * * (grows) greater as the remainder of the term lengthens."

It pointed out that in that case the remainder was 14 years; here it is 969 years; there the lease was of a store in New York City; here "evidence of the value of unexpired terms of street railway leases would be even more difficult to produce, as possible lessees are limited in number". It referred to the added difficulty of prophesying rental value for the remainder of the term under the subnormal business conditions wherein reorganizations usually occur. As an example of the well recognized difficulty of proving damages for rejection of leases it cited *Pennsylvania Steel Company* v. *New York City Street Railway Company* (198 Fed. 721, 759), wherein the Circuit Court of Appeals disallowed claims under 999 year leases on the ground that damages had not been established with the requisite degree of certainty (305 U. S. 504-5).

Clearly these comments and references would not have been included in its opinion if this Court had

intended to say that the uncertainty of loss in long-term leases could be eliminated by treating them as short-term leases or that the "well recognized" difficulties of proof could be overcome by ignoring them and disregarding all but the earlier portion of the term.

CONCLUSION.

Wherefore, it is respectfully submitted that the decision of the Circuit Court of Appeals should be considered by this Court in the light of its opinion in Connecticut Railway & Lighting Co. v. Palmer, 305 U. S. 493, supra, and should be reversed.

JAMES GARFIELD,
HERMON J. WELLS,
Attorneys for Petitioners.

March 25, 1940.

Blank Page

Blank Page

FILE COPY

FILED

OCT 10 1940

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 38.

HOWARD S. PALMER, JAMES LEE LOOMIS and HENRY B. SAWYER, Trustees of the Property of The New York, New Haven and Hartford Railroad Company, Debtor,

Petitioners,

—against—

CONNECTICUT RAILWAY & LIGHTING COMPANY,

Respondent.

BRIEF FOR PETITIONERS.

JAMES GARFIELD,
HERMON J. WELLS,
Counsel for Petitioners.

October 4, 1940.

The Lawyers Press, N. Y. C.

Blank Page

INDEX.

	PAGE
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statute Involved	3
Opinion of This Court	2
Statement	3
Summary of Argument	5
Argument	6
1—Damages Cannot Be Awarded for a Portion of the Unexpired Term of the Lease in Disregard of the Balance	6
2—As the Mind of the Trial Judge Was Not Satisfied As to the Evidence of Damage, the Appellate Court Should Not Have Awarded Damages on the Basis of That Evidence	13
3—The Evidence in this Case Does Not "Show Damages to Reasonable Certainty"	17

TABLE OF CASES CITED:

City Bank Co. v. *Irving Trust Co.*, 299 U. S. 433	8
Connecticut Railway and Lighting Company v. *Palmer*, 305 U. S. 493	2, 3, 5, 8, 9, 15, 20
Kuehner v. *Irving Trust Company*, 299 U. S. 445	15
Old Colony Railroad Co. v. *N. Y., N. H. & H. RR. Co.*, 98 Fed. (2d) 670	11
Palmer v. *Palmer*, 305 U. S. 578	12
Pennsylvania Steel Co. v. *New York City Railway Co.*, 198 Fed. 721	9, 12

PAGE

People ex rel. Nelson v. *West Town State Bank*, 299 Ill. App. 242, rev'd 373 Ill. 106 ..... 12n

Public National Bank of New York, Ex Parte, 278 U. S. 101 16

Wise Shoes, Inc., In re, 2 Fed. Supp. 521, 64 Fed. (2d) 1023 ..... 12, 13

OTHER AUTHORITIES CITED:

Bankruptcy Act:
Section 25(c) 1
Section 77 ..... 2, 3, 6, 14
(b) 2

H. R. 6249, 74th Congress, First Session 14

Judicial Code, as amended by the Act of February 13, 1925:
Section 240(a) 1

11 U. S. C. A.:
Section 205 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 38.

HOWARD S. PALMER, JAMES LEE LOOMIS and HENRY B. SAWYER, Trustees of the Property of The New York, New Haven and Hartford Railroad Company, Debtor,

Petitioners,

—against—

CONNECTICUT RAILWAY & LIGHTING COMPANY,

Respondent.

BRIEF FOR PETITIONERS.

Opinions Below.

The District Court's opinion (R. 265-290) is not officially reported. The opinion of the Circuit Court of Appeals is reported at 109 Fed. (2d) 568 (R. 293-301).

Jurisdiction.

The order for mandate was entered on March 2, 1940. Petition for certiorari was filed on March 27, 1940 and was granted on April 22, 1940. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, and Section 25(c) of the Bankruptcy Act as amended.

Questions Presented.

In adjudicating a landlord's claim for damages for rejection of a lease in the reorganization of a railroad under Section 77 of the Bankruptcy Act, as interpreted by this Court in *Connecticut Railway and Lighting Company* v. *Palmer* (305 U. S. 493):

1. May damages be awarded for a portion of the unexpired term of the lease without any proof as to the balance of the term?
2. May an appellate court allow damages on the basis of evidence which the trial judge has held does not satisfy his mind?
3. Does the evidence in this case prove damages with the requisite degree of certainty?

Statute Involved.

The statute involved is Section 77, subsection (b) of the Bankruptcy Act (11 U. S. C. A., Section 205), the pertinent language of which is:

> "* * * In case an executory contract or unexpired lease of property shall be rejected, * * * any person injured by such * * * rejection shall for all purposes of this section be deemed to be a creditor of the debtor to the extent of the actual damage or injury determined in accordance with principles obtaining in equity proceedings * * *."

Opinion of This Court.

The meaning of the quoted portion of the statute was interpreted by this Court in its previous opinion in the

instant case (*Connecticut Railway and Lighting Company v. Palmer,* 305 U. S. 493). It said:

"* * * the changes of the Committee on the Judiciary in the wording of the Coordinator's draft, by which 'actual' was inserted before 'damage' and 'determined in accordance with principles obtaining in equitable proceedings' added as a guide, were intended to call emphatically to the attention of those administering the reorganization section the requirement that only those damages susceptible of definite proof should be allowed. We cannot read a limitation on damages into the language as enacted * * *" (p. 502).

"* * * The measure of damages * * * (is) the present value of the rent reserved less the present rental value of the remainder of the term" (p. 504).

"Judges in equitable proceedings will have the advantage of evidence in applying the usual rules as to the measure of damages. It is well understood that such evidence must show damages to reasonable certainty. Mere 'plausible anticipation' does not merit consideration nor are flights into the realm of pure speculation entitled to be treated as evidence. The determination of the amount to be allowed as the damage will be based on evidence which satisfies the mind" (p. 505).

Statement.

The respondent in 1906 leased to the predecessor of The New York, New Haven and Hartford Railroad Company (herein called the New Haven) certain street railway properties in Connecticut for a term of 999 years (R. 5-30). On October 23, 1935, the New Haven filed a petition for reorganization under Section 77 of the Bankruptcy Act

(R. 1). Petitioners are the trustees of its property appointed by the bankruptcy court. On December 18, 1935, the trustees, with the court's approval, rejected the lease of respondent's property (R. 266). On November 16, 1936, respondent repossessed the property (R. 268).

From the beginning of the lease until its rejection The Connecticut Company, a wholly owned subsidiary of the New Haven, had operated respondent's property as part of a much larger system of street railway properties owned by The Connecticut Company. Until the lease was rejected there had never been any segregation of either operations or accounts as between the leased and the owned properties (R. 268). Under order of the court separate records of the operation of respondent's property were kept from shortly after the beginning of the reorganization proceedings until repossession. Since repossession respondent has operated its own property as a separate system and has kept its own records (R. 268). At the time of repossession the leased premises consisted partly of trolley properties and partly of bus properties. Immediately following repossession respondent converted it all into busses (R. 268).

Following rejection of the lease respondent filed various claims against the New Haven estate. The only one here involved is that for damages for loss of future rent due to rejection of the lease. On that claim the District Court at the first trial allowed damages in the amount of the difference between the rent reserved in the lease and the net earnings of the property during the period of the reorganization proceedings.* After affirmance by the

---

* The actual order awarded damages up to the date of the original hearing and provided that respondent might apply for a subsequent hearing, to be held as late in the reorganization proceedings as the Court would permit, to determine damages until the date of such final hearing (R. 38).

Circuit Court of Appeals (95 Fed. (2d) 483), this Court reversed and remanded the case to the District Court for further proceedings in accordance with this Court's opinion (305 U. S. 493, 506).

A second trial was held before the District Court. Respondent was allowed to introduce all the evidence which it offered. The court held that the record was insufficient to permit recovery of any damages under the provisions of the statute as interpreted by this Court. It therefore dismissed the claim (R. 265-290). Respondent appealed and the Circuit Court of Appeals reversed the decision and awarded damages in the sum of $4,411,837.61, based on the difference between rent and earnings for the three years which had elapsed between rejection and the hearing and the difference between rent and estimated earnings for eight years into the future, all discounted back to January 1, 1936 (109 Fed. (2d) 568; R. 300).

Petitioners sought review on the ground that the decision of the Circuit Court of Appeals was in conflict with this Court's opinion.

Summary of Argument.

1. Respondent's right to recover damages for the rejection of the lease depends upon whether it will be injured by the destruction of the *entire* remainder of the term. It cannot waive, nor can the courts waive for it, the latter part of the term. It conceivably might, intentionally or through failure to prove the amount, waive *damages* for the latter part of the term if it had proved that it would surely be damaged during that part. It could not recover for a loss in the early part of the term without proving that there would be no offset to that loss during the later part.

2. The trial judge found that the evidence of rental value was insufficient to satisfy his mind. Under the peculiar language of Section 77, as interpreted by this Court, the appellate court should give greater than ordinary weight to such a finding and should not reverse it except for manifest errors of law.

3. The evidence in this case does not "show damages to reasonable certainty".

Argument.

1. Damages Cannot be Awarded for a Portion of the Unexpired Term of the Lease in Disregard of the Balance.

Under Section 77 a landlord whose lease has been rejected gets his property back. From that time until the end of the term of the former lease he has the use of the property, that is, he enjoys its rental value, instead of receiving the rent called for in the lease. Whether he is injured by the rejection depends upon whether such rental value is less or greater than such rent.

Whenever a lease is rejected it is likely that the rental value of the property is currently less than the rent reserved. Otherwise it would probably not have been rejected. The early part of the unexpired term is therefore often a period when the landlord will receive less for the use of the property than he would have received under the lease. This, however, does not necessarily prove that he has been injured by the rejection. The use of the property in the later years of the term may prove to be of greater value than the rent reserved in the lease. He may actually be better off through having his property back. If the lease has only a short time to run, a condition of economic depression existing at the time of

rejection may well last throughout the entire remainder of the term. But if there is a long unexpired term, the reverse may be true.

Therefore, the question whether a landlord has been injured by rejection of his lease is one which depends for its answer upon what will happen during the entire unexpired term, not merely the first part of it. To decide it on the basis of an initial loss and disregard the latter portion of the term is equivalent to finding that the rental value of the property will not during that period equal the rent. Such a finding cannot be made without proof. To say that proof may be dispensed with because it is too difficult is either to say that the court may remake the contract for the parties by shortening the term of the lease or that the burden of proof shifts when it becomes too heavy to bear. Neither, we submit, is true.*

As the landlord is seeking damages for the rejection of his lease, it is necessarily the loss of that very lease, not a different one, which must be considered. What he would have lost if a lease for some other term had been rejected is of no relevance. The parties created certain rights by entering into the contract. It is those rights which have been destroyed, not different rights based on another contract which they might have made, but didn't. Damages for the destruction of a right are measured by the value of that right, not by the value of some other right. The landlord can, therefore, recover only if he has been injured through losing the difference between rent and rental value for the *entire* remainder of term for which he bargained.

This is recognized in the decisions dealing with claims for loss of future rent. It is referred to by this Court

---

* Both of the lower courts held that the burden of proof is on respondent (R. 281-286, 298).

as the "uniform" measure of damages (305 U. S., p. 504) and as "a method of liquidation familiar and fair" (*City Bank Co.* v. *Irving Trust Co.*, 299 U. S. 433, 443). It is the measure and method which were prescribed for this very landlord when this Court defined the measure of damages as

> "the present value of the rent reserved less the present rental value of the remainder of the term" (305 U. S., p. 504).

If there could be any doubt as to what was meant by "the remainder of the term" it is dispelled by the statement that "Here there is a remainder of 969 years" (305 U. S., p. 505).

On rescript the District Judge interpreted this Court's opinion as holding that the cause of action was "indivisible and comprehensive damages for the entire unexpired term" (R. 287).

The Circuit Court of Appeals, on the other hand, apparently felt that this Court could not have meant to require proof for the entire balance of the term because

> "damages for 969 years cannot be imagined, much less proved" (R. 297).

Although it recognized that the measure of damages is the present worth of rent less rental value "for the balance of the term", it held that

> "a lessor may recover only so much of his damages as he is able to establish with reasonable certainty. In effect, the law for purposes of damages treats a lease with 969 more years to run as if it were only for a term within the reach of fairly definite forecast; the unpredictable stretch beyond is disregarded" (R. 298).

That this Court was aware of the problem involved in proving damages for rejection of long-term leases but nevertheless intended that the proof should cover the whole term is, we respectfully submit, indicated in its comments that

> "The difficulties of proof are well recognized" (305 U. S., p. 504),

and

> "the uncertainty as to the loss entailed by abrogation of leases * * * (grows) greater as the remainder of the term lengthens" (p. 505).

The uncertainty of loss and the difficulties of proof would be no greater under a long lease than a short one if proof as to the latter part of the long term were unnecessary. Moreover the case cited to illustrate "the difficulties of proof" was one in which claims under 999 year leases were disallowed on the ground that damages had not been established with the requisite degree of certainty (*Pennsylvania Steel Co.* v. *New York City Railway Co.*, 198 Fed. 721, 759).

As we have said, the question whether the landlord has been damaged by rejection depends on whether he will receive less from the use of his property than he would have received under the lease. This cannot be shown by evidence which relates only to a portion of the unexpired term and ignores the balance, especially where, as here, the ignored balance constitutes 99% of the whole.

The length of the unexpired portion of the term is one of the facts on which the right to damages depends. It cannot be altered by disregarding a portion of the term. If the claimant should show that it would be injured during the first part of the remainder and would not recoup any part of such injury thereafter, it might be permitted to recover the damages proved for the early years and

ignore the later years. That would mean merely that it had waived something the right to which it had established, but the amount of which it had failed to prove. But the later years cannot be "disregarded" in the sense that damages for the early years may be awarded without proof that there will be no offset during the later years.

The Circuit Court of Appeals seems to have overlooked this distinction. In disregarding "the unpredictable stretch" it was not permitting the landlord to waive damages the right to which had been proved. On the contrary, it was enabling him to recover for early losses without showing that "the unpredictable stretch" would not wipe them out and make him whole. It did not find that he would be injured by the loss of the entire term. It merely said:

> "For the purposes of the age in which we live, we know that the rejection of the lease caused a severe loss to the claimant" (R. 297).

Even if this sort of finding might have justified "disregarding" the balance of the term of a lease which did not extend beyond "the age in which we live", it could not, in the absence of a finding that there would be no offsetting gain in later "ages" of the term, justify disregarding any portion of the term of *this* lease. Especially is this true in the face of the trial court's finding that

> "There is no basis for assuming that the demised properties * * * will never throughout the term produce earnings greater than those to be expected in the next forty years or so" (R. 279).

It may well be that landlords of very long leases will often find it impossible to prove any "actual" loss from

the rejection of the remainders of their terms. That, as this Court has indicated, is a difficulty inherent in such leases. But it has its compensations. Landlords stand in a somewhat special position among the creditors. Unlike other creditors, they get their property back. The longer the remainder of the term, the more they have returned to them and the greater the possibility of their being able at some time during the unexpired term to make a more profitable disposition or use of it. A 999 year lease, when made and for centuries afterwards, is practically a fee. On rejection during the early part of the term the lessor not only in effect gets back the fee, but also may assert claims for breaches of covenant including one for loss of rent over a period of time which, from the point of view of the present, is equivalent to perpetuity.

The only case cited by the Circuit Court of Appeals as authority for not requiring proof as to the latter portion of the unexpired term is its own decision affirming an allowance of damages to the Old Colony Railroad for rejection of a lease by the New Haven Trustees. Judge Hincks had awarded damages on the same basis that he had applied in the first trial in this case. In upholding that allowance the Circuit Court of Appeals said:

> "Even if we were free, we should not have sustained the full extent of the plaintiff's claim; it is a fanciful notion that one may forecast the future value of a railroad half a century hence. We need not say whether, if the matter were for the first time before the court as now constituted, a majority might have been disposed to allow future damages for a period of say five or ten years, on the theory that present estimates for as long as that might have some validity." (*Old Colony Railroad Co.* v. *N. Y., N. H. & H. RR. Co.*, 98 Fed. (2d) 670, 672.)

That decision was reversed on certiorari and the case was remanded for further proceedings in conformity with this Court's opinion in the instant case (*Palmer* v. *Palmer*, 305 U. S. 578). Thus, the only authority cited by the Circuit Court of Appeals for "disregarding" part of the term is a suggestion—not even a dictum—in one of its own decisions in a case which was subsequently ordered retried on the basis of the opinion in this case. Obviously that suggestion throws no light on the meaning of the language later used by this Court.

The Circuit Court of Appeals for the Second Circuit has never before, so far as we have been able to discover, departed from the universal rule* that damages for loss of future rent will not be awarded for part of the unexpired term without proof of damage for the whole term. The *Pennsylvania Steel Company* cases are the leading examples of its attitude. The doctrine was reiterated as recently as 1933 in *In re Wise Shoes, Inc.* (64 Fed. (2d) 1023) when Circuit Judges L. Hand, Swan and A. N. Hand affirmed a decision by then District Judge Patterson who, incidentally, was the Circuit Judge who wrote the opinion in the instant case. In the *Wise Shoes* case, Judge Patterson had said:

"* * * it was impossible at the time of bankruptcy to

---

* This is to be distinguished from the doctrine that rent or damages may be recovered up to commencement of the action in cases where the lease has not been terminated by rejection or otherwise, and from cases where the lease contained a covenant to pay deficiencies which the court interprets as giving rise to a cause of action on each rent day. In such cases the claim accrues as each rent period comes along. In proceedings where damages are sought for loss of future rent, however, we have found only one case in which any court has allowed the loss for a part of the term without proof as to the balance (*People ex rel. Nelson* v. *West Town State Bank*, 299 Ill. App. 242). That case was reversed on further appeal on the ground that in the absence of a covenant for damages there could be no recovery in a receivership (373 Ill. 106).

say whether there would be any deficiency over the next seventeen years *taken as an entirety.* Probably there will be a loss for some years, *but who can say that any such loss will not be swallowed up in the later years of the term?*" (2 Fed. Supp. 521, 523). (Italics ours.)

When this case came before this Court previously it was the allowance of damages for the early part of the unexpired term and the ignoring of the later part that led to its reversal. Damages had been awarded for a period roughly equal to the time required for reorganization on the theory that "actual" injury meant accrued injury. That theory had at least the merit of leaving nothing to prophecy. It eliminated all speculation as to future values and all uncertainty as to where to divide the term. But even so this Court rejected it on the ground that the statute did not create a new measure of damages. If it were proper to split the term at all, surely the trial court's original theory was fairer and less arbitrary, and could more readily have been justified under the statute, than the measure now proposed by the Circuit Court of Appeals.

2. As the Mind of the Trial Judge Was Not Satisfied As To The Evidence of Damage, The Appellate Court Should Not Have Awarded Damages on the Basis of That Evidence.

Judge Hincks ruled that

> "the evidence of claimant and debtor alike lacks that 'reasonable certainty * * * which satisfies the mind'" (R. 282).

The action of the Circuit Court of Appeals in awarding damages on the basis of the evidence which Judge Hincks had thus characterized indicates that it interpreted this

Court's opinion as encouraging the appellate court to draw its own inferences from the record even where the trial court had held the evidence inadequate. We respectfully suggest that the decision of this Court should not be so understood.

The problem before this Court was to construe the meaning of rather obscure words added to Section 77 by the amendment of 1935. That section as originally enacted in 1933 made provable a "claim for future rent" but said nothing about the method of proof or measure of damages. An amendment was introduced in 1935 which provided that in case of the rejection of a lease

> "any person injured by such * * * rejection, shall * * * be deemed to be a creditor to the extent of such damage or injury" (H. R. 6249, 74th Congress, First Session).

The draft bill containing this language was referred to the House Committee on Judiciary which changed the words "such damage or injury" to "the actual damage or injury determined in accordance with principles obtaining in equity proceedings".

This Court held that the substituted words were not intended, as the lower courts had thought, to establish a limitation upon damages or a new measure of damages, but that they related to the manner of proving damages. It pointed out that in other sections of the Bankruptcy Act specific limitations of one year's rent or three years' rent had been prescribed in bankruptcy and general corporate reorganization proceedings, but that Congress had not provided such a measure in railroad reorganizations. The added words

> "were intended to call emphatically to the attention of those administering the reorganization section the

requirement that only those damages susceptible of definite proof should be allowed" (305 U. S., pp. 499-502).

In further explanation of the sort of proof necessary to establish damages for loss of future rent the Court stated that the evidence in this sort of case "must show damages to reasonable certainty", that "plausible anticipation" and "flights into the realm of pure speculation" must not be considered and that "the determination of the amount to be allowed as the damage will be based on evidence which satisfies the mind" (305 U. S., p. 505).

Whatever the exact meaning of the change in the statute there can be no doubt that its general purpose was to protect the other creditors in a reorganization from disproportionate awards to those who, like landlords or other executory contractors, receive back their property. Congress had recognized the necessity for such protection in the express limitations on damages in other sections of the Bankruptcy Act. This Court had also recognized such necessity when it said:

> "*Whatever courts,* in the absence of a statutory formula, *might feel compelled to adopt as the measure of damage* in such a case, we cannot hold that Congress could not reasonably find that an award of the full difference between rental value and rent reserved for the remainder of the term smacks too much of speculation and that a uniform limit upon landlords' claims will, in the long run, be fair to them, to other creditors, and to the debtor" (*Kuehner* v. *Irving Trust Company,* 299 U. S. 445, 454). (Italics ours.)

The words "such damage or injury" obviously left the door wide open to recovery of any loss which a landlord could prove. No amendment to those words was necessary

to insure that right. Proof would, of course, have had to be made in accordance with the usual rules of evidence, but no limit on damages and no change in procedure or character or proof was indicated. Then Congress changed "such" to "the actual". In so doing it was not making an empty gesture. "Significance and effect shall, if possible, be accorded to every word" (*Ex Parte Public National Bank of New York*, 278 U. S. 101, 104).

In thus calling "emphatically to the attention of those administering the reorganization section the requirement that only those damages susceptible of definite proof should be allowed", Congress was clearly seeking to define and limit a landlord's right in some manner. If it was not prescribing a new measure of damages it must have been either setting up a different standard of proof from that applicable in other cases or directing the courts to give a different significance and weight to the evidence. Certainly, it was not merely reminding the courts to do what they must do under any statute and in every case, namely, to obey the rules of evidence and procedure.

The word "actual" clearly imports that because of the danger that speculative elements might enter into the otherwise unlimited determination of a landlord's damages, Congress intended to prescribe a requirement that such damages must be proved in such fashion as to satisfy the court that they would certainly be suffered. If any doubt existed they could not be allowed. Therefore, if the trial judge's mind was not satisfied his finding that the evidence was insufficient should be given the weight and significance which attach to a finding of fact by a jury or by an administrative tribunal and should not be reversed except for an error of law.

We believe that when this Court said that the determination of damages must be based "on evidence which satisfies the mind", it meant that if the evidence is of a sort that a reasonable man, sitting as a trial judge and acting

properly in his judicial capacity, finds insufficient to satisfy his mind, the appellate court should not award damages on the basis of that evidence. In other words, it should not draw new and different inferences from the record which the trial court declined to draw. And if the judge who heard and saw the witnesses and is familiar with the entire background of the proceeding is not satisfied, the appellate court should not rule that the evidence "satisfies the mind".

We therefore submit that the appellate court's finding that Judge Hincks was "unduly critical" of the evidence, is not sufficient to warrant a reversal of his decision.

3. The Evidence in this Case does not "Show Damages to Reasonable Certainty".

Even if it were appropriate for the appellate court to reverse a finding by the trial judge that the evidence does not satisfy his mind, it could not properly find that damages have been proved in this record with the requisite degree of certainty.

The only evidence contained in the record which could conceivably throw any light on the subject of rental value consists of the past earnings, actual or estimated,* of the leased property, its book value before rejection, the statement that the demised trolley properties were in part converted to busses prior to repossession in November, 1936, and wholly so converted shortly thereafter, and the value on December 31, 1938, of the property then belonging to the respondent.

No evidence was offered of the character of the terri-

* As no separate accounts for respondent's property were kept prior to rejection of the lease, the earnings for all periods before December 18, 1935, are based on an estimated segregation subsequently prepared. Such estimated segregation was carried back through 1921 (Ex. Y-1, Y-2, Y-4). Prior to that date the earnings are shown only for The Connecticut Company's entire operated system (Ex. Y-3).

tory served or the existence or possibility of competitive transportation agencies therein, nor of developments or trends or prospects in the art, or in that territory. There was no testimony as to what future developments might be expected or how they would affect the character, volume or profitableness of respondent's enterprise.

Respondent apparently based its case upon the assumption that it had been damaged and that the only question to be decided was the *amount* recoverable. Its "proof" of the *fact* of damage consisted solely in showing that the lease had been rejected and that current earnings of the property were less than the rent reserved.

In presenting certain computations based on past earnings its counsel said:

> "I propose to submit a whole series of ratios and a whole series of periods, so that the court can choose whatever he wants, whatever he thinks fair" (R. 109).
>
> "I do not say it is correct, but I say that this is an interesting fact which the trier of fact might take into consideration. And I want it to go into evidence, not as absolute proof of anything, but as an interesting fact which the trier of fact may take into consideration if he thinks it is of any importance" (R. 110).
>
> "I am not making forecasts. I am leaving it to the court to make them" (R. 139).

Its theory is further illustrated in the following language from its trial brief quoted in the District Judge's opinion:

> "The past is the only criterion of the future that there is; and the production of experts to relieve one from the pains of thought in this regard is not really useful" (R. 276).

Commenting on the absence of expert testimony the trial judge said:

> "I quite agree that the bare opinion of one posing as an expert on future rental value would be of little help to the court in connection with its present task. But on the other hand, it is conceivable that the court might have been considerably assisted by a broad, sound survey by an expert of demonstrated competence covering the field of passenger transportation by bus in the relevant territory and contiguous regions; including perhaps such factors as industrial and residential developments, past and future; the growth, volume and earnings of bus traffic, both in the relevant territory and similar territories; the existence and condition of competitive agencies; and the possibilities and effects of consolidation with other combinations of capital in the general field. I cannot now say that any such survey would have sufficed as a sole base for the assessment of damages. I think, however, some such survey might have constituted a firmer base than anything contained in the record" (R. 276-277).

Even as to "the past" respondent's showing was limited to the earnings and estimated earnings of the property averaged for five different periods all of them ending with December 31, 1938, and none of them extending further back than 1924. These averages were then projected for 37 years into the future after making certain additions* to prospective earnings on the basis of this Court's

* The District Court pointed out that the petitioners claim that the additions should be greater than those proposed by respondent, but made no finding on the matter because "the contest between the parties over this item is moot under my view of the controlling issues" (R. 273, footnote). The Circuit Court of Appeals made no reference to this matter.

ruling that the sinking funds which came into respondent's possession on termination of the lease would increase the earning power of the property (305 U. S., p. 505).

The five periods for which averages of past earnings were computed included, respectively, fifteen years (Exs. X2 and X6), eighteen months (Ex. X2A), three years (Ex. X2B), ten years (Ex. X2C) and fourteen years (Ex. X2D). No use was made by respondent of earnings of the years prior to 1924. The fifteen year average was shown to be based on erroneous estimates and was disregarded by both the lower courts.

The trial judge's findings with regard to the eighteen month average were as follows:

> "I hold that the earnings for the eighteen months of bus operation ending in December, 1938 is inadequate as a base for finding future rental value.
>
> "In 1936 when operation of the demised property was in substantial part by trolley, the net operating income was $246,000. In 1938, the first full calendar year of 100% bus operation, the earnings were only $121,000. There is no evidence to show whether this shrinkage was due to a general recession in business conditions or to an error in judgment in changing from trolley to bus operations. Either cause destroys the validity of this period as a base upon which damages may be computed" (R. 273).

With regard to the three year average the judge said:

> "I hold that the earnings for the years 1936-1938 are inadequate as a base. During half of this period, operations were in substantial part by trolley. I agree with claimant's counsel that this period, as an experience period, is thereby 'perturbed by irrelevant or inaccurate factors.' Moreover, this period also was one of economic depression" (R. 274).

As to all the longer periods the judge said:

> "And I hold that all earlier periods concerning which there is evidence are unsuitable for use as experience periods. They are irrelevant in that they cover operation in large part by trolley. They are speculative in that there is no evidence from which the relative frequency of the fat years and the lean can be forecast. * * *
>
> "Predictions on such scant data are not even 'plausible anticipations' which the Supreme Court has said are not enough. Especially is that so in a case such as this where after thirty years of trolley operation, the claimant itself after repossession wholly abandoned trolley operation for bus operation and on its brief urges that only results on the new basis (of eighteen months) are not 'perturbed by irrelevant or inaccurate factors' resulting from superseded trolley operations" (R. 274-5).

The court not only ruled that the evidence was insufficient to warrant recovery for the entire unexpired term, but, by necessary inference,* that it would not support damages even for a portion of the term.

The Circuit Court of Appeals disregarded these findings and proceeded to select from among the several averages of past earnings as computed by respondent that which in its opinion

> "furnished a more reliable indication of future earnings than any of the others" (R. 299).

---

* "I hold, however, that *even if claimant had been able to prove* such a history or prospect of earnings for the demised premises as would support an assessment of *damages for an unexpired term of say, forty years,* that proof standing alone would not necessarily be adequate to support an assessment for the unexpired term of 969 years * * *" (R. 277). (Italics ours.)

It did not expressly overrule the lower court's holdings that this evidence was inadequate to show rental value, but merely found that it was "enough to serve as an *approximate* measure of earnings for some years to come" (R. 299, italics supplied). We submit that this falls far short of holding that the evidence shows damages "to reasonable certainty" or "satisfies the mind".

The reason assigned for considering the fourteen year average "more reliable" than the others was that

> "it had the great merit of covering ups as well as downs in the general economic conditions which the shorter periods did not do" (R. 299).

The years were 1925 through 1938. While, therefore, they did include some "ups", they included a much larger proportion of "downs". They embraced the depression from its very beginning, but only a part of the preceding era of prosperity. A period which does not include even one complete economic cycle cannot be considered a reliable base for forecasting even so small a part of the remainder of the term as the next eight years.

But even if it had, as we have said, the record contains no evidence as to whether conditions in the industry or the territory are now, or are likely to be, sufficiently similar to those during the past fourteen years to permit of such a forecast. In apparent recognition of the necessity for such a showing the Circuit Court of Appeals said that it had

> "in mind the character of the property, the territory served, the history of operations down to the time of the trial, the general economic conditions under which past operations have been conducted, and the other factors in the case" (R. 300).

It is apparent from the record that practically all of this background must have been supplied through judi-

cial knowledge, unsupported by evidence and not explained or qualified by the advice of any expert. From the record, all that the appellate judges could have known of the character of the property was simply that it was trolleys which were gradually being converted into busses. Of the territory served, they had, of course, the familiarity of well-informed citizens, certainly no greater knowledge than that of Judge Hincks, who lives there. Of the history of operations, they had nothing except net earnings. Of the general economic conditions, again, they had no more than the knowledge of any well-informed persons, for they were offered nothing else (R. 109-139).

We submit that that was not enough to enable the Circuit Court of Appeals to do what it undertook to do, namely, to exercise "an informed and reasoned judgment on the probable earnings in the future" (R. 300). The Court did not have even the amount of information and advice which any business man would demand before exercising such judgment in the making of a lease. And in the making of leases certainty is not required and seldom attainable. Guess-work and horse trading are neither unknown nor illegal. In fixing damages under Section 77 they are forbidden.

The respondent's only other suggestion as to future rental value—it can hardly be called evidence, and the Circuit Court of Appeals did not even mention it,—was that the Public Utilities Commission of Connecticut would probably not permit more than 6½% to be earned on the value of the property. The value which respondent proposed to use for purposes of this argument was as of the end of 1938 (R. 209). 6½% on that value would, it was contended, constitute a probable ceiling beyond which public regulation would not permit earnings to go.

This is, of course, a mere assertion. Even if otherwise

accurate it is not, and could not be, evidence of future earnings or of rental value. The Circuit Court of Appeals ignored it and the District Court rejected it (R. 280-1). Moreover, the value base which the respondent used is not tenable. It was an appraisal of the properties after they had been in the control of the respondent for over two years and after a substantial part of them had been abandoned and all had been converted from trolleys into busses (R. 209). If this theory had any validity, the value to be considered would of course have to be that at the time of rejection. The only evidence of the value at that time is the book value of about $31,000,000 (R. 160-1). 6½% on any such sum as that would far exceed the rent reserved.

Even if there had been sufficient evidence of rental value of the physical property to warrant the Circuit Court of Appeals in reversing the District Court's findings on that subject, the record is devoid of findings on another element* necessary to the determination of damages. We have already referred to the controversy and lack of findings as to the amount to be added to post-rejection earnings on account of respondent's acquisition of the sinking funds on termination of the lease. The Circuit Court of Appeals appears to have adopted respondent's contention, though it did not discuss or, so far as its opinion discloses, even consider petitioner's evidence and argument and it made no finding on the subject except such as is implied in its use of one of respondent's ex-

---

* As the trial court dismissed the claim for lack of proof of rental value, no findings were required as to future rent or discount rate (R. 268, 270). The Circuit Court of Appeals, in computing damages up to 1946, apparently adopted the 4% discount rate suggested by respondent. Its opinion, however, contains no finding or discussion of either that subject or future rent. This Court has noted the future reduction in rental provided for in the lease (305 U. S. p. 495).

hibits* in computing damages. Nor, so far as appears, did it consider the earnings history of the leased properties prior to 1925, when the proportion of depression to prosperity was very much less than during the fourteen subsequent years (R. 197-200 and Exhs. Y3 and Y4). Consequently, it erred not only in reversing the District Court's judgment but in failing to take into account all of the elements which should have gone into a computation of damages.

* * *

We therefore submit that the trial court was right; there was not enough evidence to satisfy the requirement of reasonable certainty; and the Circuit Court of Appeals erred in awarding damages for any part of the unexpired term.

We respectfully ask this Court to reverse the judgment of the Circuit Court of Appeals and to direct it to affirm the decision of the District Court.

Respectfully submitted,

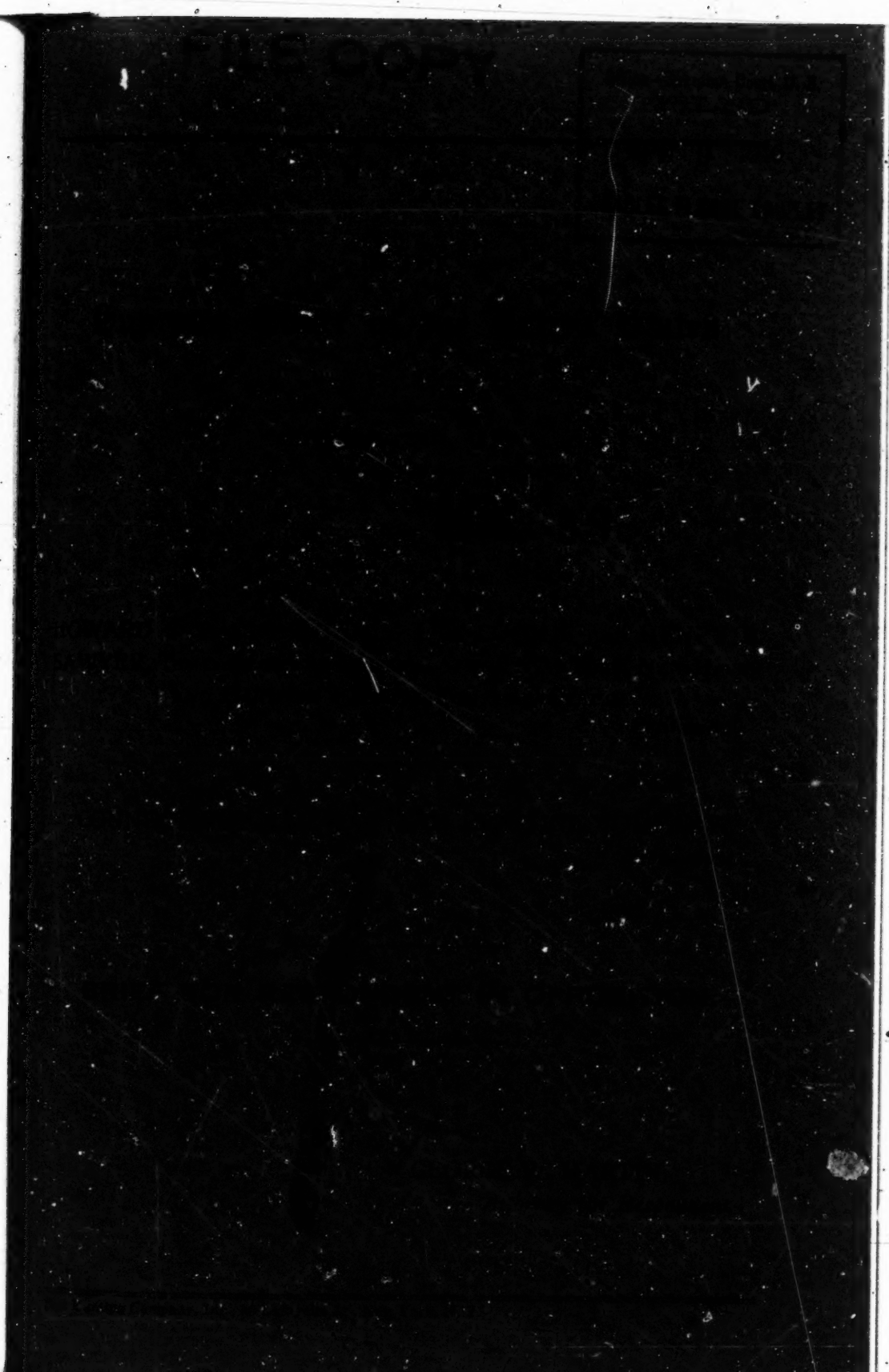
JAMES GARFIELD,
HERMON J. WELLS,
Counsel for Petitioners.

October 4, 1940.

---

* It is not apparent how the sum of $4,411,837.61 was arrived at by the Circuit Court of Appeals. Presumably it was based on Respondent's Exhibit X-2D, which uses the fourteen-year average. That exhibit was shown to contain certain errors and to omit certain originally controversial revenues (R. 192-195). We have been unable to check the computation mathematically from any figures in the record. Consequently we cannot tell whether or not proper allowances were made for the errors contained in the exhibit.

Blank Page



Blank Page

INDEX

	PAGE
Opinions Below	1
Jurisdiction	1
Question Presented	2
Statement	2
Argument	4
Conclusion	5

TABLE OF CASES

City Bank Co. v. *Irving Trust Co.*, 299 U. S. 433..... 2

Connecticut Railway & Lighting Co. v. *Palmer*, 305 U. S. 493.....2, 4

General Talking Pictures Co. v. *Western Electric Co.*, 304 U. S. 175..... 5

Blank Page

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No.

HOWARD S. PALMER, JAMES LEE LOOMIS and HENRY B. SAWYER, Trustees of the Property of The New York, New Haven and Hartford Railroad Company, Debtor,

Petitioners,

AGAINST

CONNECTICUT RAILWAY AND LIGHTING COMPANY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

The opinion of the Circuit Court of Appeals (Patterson, *J.*) is reported in 109 Fed. (2nd) 568.

Jurisdiction.

Jurisdiction to issue the writ is vested in this Court by Sec. 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938.

Question Presented.

Is the evidence in the record sufficient to sustain the allowance of the landlord's claim in bankruptcy for damages by reason of the rejection of its lease?

Statement.

Respondent was landlord, and the New Haven Railroad was tenant, under a 999-year lease of trolley properties. The New Haven went into bankruptcy, under Sec. 77 of the Bankruptcy Act; and its Trustees rejected the lease, which then had 969 years still to run.

Respondent filed a claim for damages arising from the rejection of its lease, and was allowed $1,263,412.92 as damages for the period from rejection (December 18, 1935) to hearing on the claim (June 30, 1937). For any period after final hearing the District Court allowed nothing, saying the statute ["the actual damage or injury determined in accordance with principles obtaining in equity proceedings"] meant that only damages accrued without acceleration at the date of hearing could be proved.

This disposition was affirmed by the Circuit Court of Appeals (95 Fed. (2nd) 483).

It was reversed by the Supreme Court (305 U. S. 493), which held that if claims for rent to accrue under a lease are to be discharged they must be made provable, for they cannot be destroyed (299 U. S. 439). The case was then remanded to the District Court for further proceedings in accordance with the opinion.

At the hearing (March 13, 1939) all the witnesses were called by Respondent. The New Haven called none. There was no conflicting testimony. There was no question involving the credibility of witnesses. The evidence was essentially reduced to written exhibits, now found in the record (R. 220-263). The basic figures for the period 1907-1937 were supplied by the New Haven Railroad; and from November 16, 1937 (date of surrender of the properties to the landlord) to December 31, 1938, were taken from the operating records of Respondent. The problem was to find the rental value of the landlord's property.

The District Court held: that the operating history of the property showing the operating revenues back to 1907 (R. 271) was inadequate to support "an assessment for the unexpired term of 969 years, which is the only term with which we are here concerned" (R. 277). "When the Supreme Court emphasized the high standard of proof required and the inherent difficulty of complying therewith, it contemplated that non-compliance should result in disallowance, not in a modification of standard and measure" (R. 278). "There is no basis for the assumption implicit in claimant's position that a past experience of even thirty years of earnings has a forecasting value for a period of over 900 years" (R. 279).

And so the whole claim for damages for rejection of the lease was disallowed—even the $1,263,412.92 allowed on the former trial was revoked (R. 287).

Respondent appealed to the Circuit Court of Appeals, which reversed (109 Fed. (2nd) 568), holding it was error to rule that the inability of Respondent to prove

damages over the entire 969 years sufficed to defeat the claim (*supra*, p. 571).

The opinion of the Court of Appeals succinctly sets forth what the Court did. In order to find a "normal" year, and thus a "normal" operating income which would indicate a true rental value, an experience period of 14 years was selected, for reasons which are stated. The rental value being thus ascertained (R. 240), the computations of damages for all future periods up to forty years were already worked out in the exhibits (R. 236-239). The selection of the experience period and the length of the forecast were judicial operations, and the only ones required; the exhibits at once gave the result in dollars. The credibility of no witness was involved; no conflict of evidence required to be resolved; in the circumstances the Court of Appeals wrote the answer itself, instead of sending the case back to the District Court for a third trial.

Argument.

No novel rule of damages (e.g. an all-or-nothing requirement) was laid down by the Supreme Court for this case. On the contrary, the Court said, "the usual rules as to the measure of damages" shall apply.

Connecticut Ry. & Lighting Co. v. *Palmer*, 305 U. S. 493, 505.

There being no doubt that the usual rules have here been applied, the granting of a writ of certiorari will not

be warranted merely to review the evidence or inferences drawn from it.

General Talking Pictures Co. v. *Western Electric Co.*, 304 U. S. 175, 178.

Conclusion.

The petition should be denied.

Respectfully submitted,

GEORGE W. MARTIN,
Counsel for Respondent,
48 Wall Street,
New York.

April 8, 1940.

Blank Page



Blank Page

INDEX.

	PAGE
...ion Below	1
...sdiction	1
...stion Presented	2
...tement	2
...ument	5
...clusion	11
...pendix A	12
...pendix B	14

TABLE OF CITATIONS.

CASES: PAGE

Briscoe v. United States, 65 Fed. (2) 404..... 17

City Bank Co. v. Irving Trust Co., 299 U. S. 433, 443 5

Connecticut Railway Co. v. Palmer, 305 U. S. 493, 505 .....2, 3, 5, 6, 7, 14

C. & O. Ry. Co. v. Kelly, 241 U. S. 485 (R. 74).. 17

Eastman Co. v. So. Photo Co., 273 U. S. 359, 378 ..... 10, 18

General Talking Pictures Co. v. Western Electric Co., 304 U. S. 175, 178..... 4

Hedrick v. Perry, 102 Fed. (2) 802..... 9

Hetzel v. B. & O. R. Co., 169 U. S. 26, 28..... 6

Kuehner v. Irving Trust Co., 299 U. S. 445, 450— 3, 5

Martins Fork Coal Co. v. Harlan-Wallins Coal Corp., 83 Fed. (2) 967, 969..... 18

Metropolitan Chain Stores, Re, 66 Fed. (2) 485, 487 18

Pieczonka v. Pullman Co., 102 Fed. (2) 432, 434 10

Rugg v. Rohrbach, 110 Ill. App. 532..... 18

Schell v. Plumb, 55 N. Y. 592, 598..... 18

Schulte-United, Ltd., Re, [1934], 4 Dominion Law R. 51..... 18

Shannon v. Shaffer Oil & Refining Co., 51 Fed. (2) 878, 881..... 18

Sheldon v. Metro-Goldwyn Pictures Corp., 106 Fed. (2) 45, 51; affirmed, 309 U. S. 390..... 10

	PAGE
Sinclair Refining Co. v. Jenkins Petroleum Process Co., 289 U. S. 689, 697	10
S. S. Black Gull, 90 Fed. (2) 619	17
Story Parchment Co. v. Paterson Co., 282 U. S. 555	18
Treat v. Hiles, 81 Wis. 280	18
United Electric Coal Co. v. Rice, 22 Fed. Supp. 221, 226	19
Ward v. General Ice Cream Corp., 172 At. 781, 782; 118 Conn. 363, 366	18

TEXT BOOKS:

A. L. I. Restatement of Contracts, §331(a)	9
Williston on Contracts, (Rev. Ed.) §1346	6
1 Sutherland on Damages (4th Ed.), §121	18
5 Williston on Contracts (Rev. Ed.) §1317	18
5 Williston on Contracts (Rev. Ed.), §1346A	19
17 Corpus Juris, 757	18

Blank Page

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 38

HOWARD S. PALMER, JAMES LEE LOOMIS and HENRY B. SAWYER, Trustees of the Property of The New York, New Haven and Hartford Railroad Company, Debtor,

Petitioners,

AGAINST

CONNECTICUT RAILWAY AND LIGHTING COMPANY,

Respondent.

BRIEF FOR RESPONDENT.

Opinion Below.

The opinion of the Court of Appeals (2nd Circuit) (Patterson, *J.*) is reported in 109 Fed. (2nd) 568.

Jurisdiction.

Jurisdiction to issue the writ is vested in this Court by Sec. 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938.

Question Presented.

In calculating the landlord's damages for rejection of a lease, under the rule laid down by the Supreme Court in this case (305, U. S. 493, 504), "the present value of the rent reserved less the present rental value of the remainder of the term", is it required that the landlord prove that the sum of the annual rental values of the leased property in each year of the remainder of the term is less than the sum of the annual rentals under the lease for that period?[1]

The Respondent contends that the answer is: No; the object is to find the present value of the rejected lease, and that object is achieved when sufficient past and present data are produced to enable an ordinary prudent person to come to an informed and reasoned judgment with regard to the present value. Extrapolation into the future will be limited by common sense.

Statement.

Respondent was landlord, and the New Haven Railroad was tenant, under a 999-year lease of trolley properties. The New Haven went into bankruptcy, under Sec. 77 of the Bankruptcy Act; and its Trustees rejected the lease, which then had 969 years still to run.

---

[1] The Petitioner also presents the question of the sufficiency of the evidence to support the damages allowed below, and remarks that: "It is not apparent how the sum of $4,411,837.61 was arrived at by the Circuit Court of Appeals" (Petitioner's Brief, p. 25). The explanation of the computation, and the reference to the evidence on which it is based are set forth in Appendix A, at page 12, *Infra*.

Respondent filed a claim for damages arising from the rejection of its lease, and was allowed $1,263,412.92 as damages for the period from rejection (December 18, 1935) to hearing on the claim (June 30, 1937). For any period after final hearing the District Court allowed nothing, saying the statute ["the actual damage or injury determined in accordance with principles obtaining in equity proceedings"] meant that only damages accrued without acceleration at the date of hearing could be proved.

This disposition was affirmed by the Circuit Court of Appeals (95 Fed. (2nd) 483).

It was reversed by the Supreme Court (305 U. S. 493), which held that if claims for rent to accrue under a lease are to be discharged then they must be made provable, for they cannot be simply destroyed (299 U. S. 439). The case was then remanded to the District Court for further proceedings in accordance with the opinion.

At the hearing (March 13, 1939) all the witnesses were called by Respondent. The New Haven called none. There was no conflicting testimony. There was no question involving the credibility of witnesses. The evidence was essentially reduced to written exhibits, now found in the record (R. 220-263). The basic figures for the period 1907-1937 were supplied by the New Haven Railroad, which had operated the properties during that period, and from November 16, 1937 (date of surrender of the properties to the landlord) to December 31, 1938, were taken from the actual operating records of Respondent. The problem was to find the rental value of the landlord's property—the difference between the rent and the rental value being the damages.

The District Court held: that the operating history of the property showing the operating revenues back to 1907 (R. 271) was inadequate, as an experience period for estimating future earnings, to support "an assessment for the unexpired term of 969 years, which is the only term with which we are here concerned" (R. 277). "When the Supreme Court emphasized the high standard of proof required and the inherent difficulty of complying therewith, it contemplated that non-compliance should result in disallowance, not in a modification of standard and measure" (R. 278). "There is no basis for the assumption implicit in claimant's position that a past experience of even thirty years of earnings has a forecasting value for a period of over 900 years" (R. 279).

And so the whole claim for damages for rejection of the lease was disallowed—even the $1,263,412.92 allowed on the former trial was revoked (R. 287).

Respondent appealed to the Court of Appeals, which reversed (109 Fed. (2nd) 568), holding it was error to rule that the inability of Respondent to prove rental value over the entire 969 years sufficed to defeat the claim (*supra*, p. 571).

The opinion of the Court of Appeals succinctly sets forth what the Court did. In order to find a "normal" year, and thus a "normal" operating income which would indicate a true rental value,[2] an experience period of 14 years

---

[2] Presumably this Court will not review the evidence or inferences drawn from it. *General Talking Pictures Co.* v. *Western Electric Co.*, 304 U. S. 175, 178. Accordingly, the mechanics of the calculation of the rental value have been relegated to Appendix B, at page 14, *Infra*.

was selected, for reasons which are stated. The rental value being thus ascertained (R. 240), the computations of damages based on annual rental values for all future periods up to forty years were already worked out in the exhibits (R. 236-239). The selection of the experience period and the length of the forecast were judicial operations, and the only ones required; the exhibits at once gave the result in dollars. The credibility of no witness was involved; no conflict of evidence required to be resolved; in the circumstances the Court of Appeals wrote the answer itself, instead of sending the case back to the District Court for a third trial.

Argument.

The formula laid down by the Supreme Court for calculating the amount of the landlord's claim for the loss of his lease is that the damages are "the difference between the rental value of the remainder of the term and the rent reserved, both discounted to present worth."

City Bank Co. v. *Irving Trust Co.*, 299 U. S. 433, 443.
Kuehner v. *Irving Trust Co.*, 299 U. S. 445, 450.
Connecticut Ry. Co. v. *Palmer*, 305 U. S. 493, 504.

The Court has stated this rule of damages as though it were a mathematical formula for ascertaining an answer in dollars but of course, in addition, it is a recognized method of ascertaining the value to the landlord of the lost lease at the time of its rejection. Because, what the landlord loses is his lease, and the damages are merely the net value of the lease.

The District Court considered that the formula was a mathematical prescription, which must be worked out from rent day to rent day all through the balance of the term of a lease in order to make sure that in no rent period, or in no series of rent periods, sufficient net avails should be realized from the property to recoup or even to exceed the amount of the lost rentals. The factor which causes the difficulty in the application of the formula in such a way is not the amount of the reserved rent and its present value discounted, but the amount of the rental value presumably based on the future net operating income from the property. In a situation like this, where the lease has no market value whatever, the formula for ascertaining the value of the lease must be applied; but it must be applied in such a way that "the damage will be based on evidence which satisfies the mind" (305 U. S. 505).

What this means is that when the evidence as to future rental value of the property attempts to cover so long a span of time into the future that, to the mind of the ordinary man, no conviction is carried that the conclusion which is going to be reached is not just pure speculation, then a point is arrived at where "reasonable certainty" disappears and prospective losses beyond that point can no longer be recovered. All this is merely the application of "the usual rules as to the measure of damages."

Williston on Contracts, (Rev. Ed.) §1346.
Hetzel v. *B. & O. R. Co.,* 169 U. S. 26, 28.

Obviously; it was not the intention of the Supreme Court, in *Connecticut Railway Co.* v. *Palmer,* 305 U. S. 493, to lay down a novel rule of damages: an-all-or-nothing rule which

required that each unit of time over the remainder of a term of 900 years should be accounted for as a period of a loss to the landlord. It was evident on the previous appeal to the Supreme Court that this Court considered the far future as unpredictable; for one of the Justices inquired of counsel for the Respondent, on the hearing, whether he claimed to have evidence which would show the rental value of the demised property 500 years in the future. To this counsel for the Respondent replied that he had no such evidence, and that he considered it was physically impossible to produce such evidence. This conclusion also is the one which is arrived at by the Court of Appeals:

> "It goes without saying that damages for 969 years cannot be imagined, much less proved. The remainder of the lease covers a span longer than from the battle of Hastings to the present day. To try to forecast events for even a tenth of that futurity would appall the boldest prophet" (R. 297).

If the Supreme Court had intended to lay down an-all-or-nothing rule, they would have dismissed the previous appeal (305 U. S. 493). For on that appeal Connecticut Railway and Lighting Company was the Appellant; and it came to the Court complaining that it had been awarded $1,263,412.92 damages for the loss of its lease accrued to the date of hearing before the District Court, but had not been allowed to prove damages on account of rentals under the lease accruing for any period subsequent to the date of the hearing before the District Court. If it had been the intention of the Supreme Court to have prescribed an-all-or-nothing rule patently impossible to comply with

in this case, they would have dismissed the appeal of Connecticut Railway and Lighting Company, saying that the landlord had already received from the District Court more than the formula for computing the damages would permit the landlord to receive.

When the Supreme Court reversed on the last appeal, it did not reverse on the ground that the Appellant had received too much, but too little; and, when the claim was sent back for a new trial before the District Court, the opinion of the Supreme Court was to be construed, not as laying down a novel rule of damages, but as a caution against an award of damages on anything like a 969 year basis. The reason is plain: no ordinary prudent man could possibly estimate the value of the lost lease as of the time of rejection on any such basis; but this does not mean that the lease has not a present value, nor that that value cannot be ascertained by the application of the formula to data which are reasonably certain, so far as any one can see, to be true and applicable; and the Court of Appeals, applying this common-sense interpretation of the Supreme Court's opinion, came to the conclusion that reasonable certainty was attained by allowing the Respondent damages for eleven years subsequent to rejection of the lease, *i. e.* three years prior to the trial in the District Court for which the damages are fully known, and eight years for which damages are estimated according to past experience for 14 years (R. 300).

This was the net value of the lease at the time it was destroyed by rejection. It is not the result of the application of a precise mathematical formula for a limited number of years, and the ignoring of a subsequent vast period

of time. It is a conclusion that the subsequent vast period of time is not an element which can enter into the present net value of the lease. This subsequent time has been weighed and found to be incommensurable with reasonable certainty.

On this question the Restatement is clear.

A. L. I. Restatement of Contracts, §331(a):

> "The requirement of reasonable certainty [the words of the Supreme Court, 305 U. S. 505] does not mean that the plaintiff can recover nothing unless he establishes the total amount of his harm; nor does it mean that he cannot get damages unless he proves the exact amount of his harm. The requirement merely excludes those elements of harm that cannot be evaluated with a reasonable degree of certainty."

The rule set forth in the Restatement is amply supported by authority.

Hedrick v. *Perry*, 102 Fed. (2) 802.

The Court (Tenth Circuit) says at page 807:

> "The tendency of the early cases was to restrict the recovery of damages to matters which were susceptible of having attributed to them an exact pecuniary value. But that rigid rule has been relaxed in some measure. Recovery cannot be had where there is uncertainty whether a contract has been breached or a tort committed, but damages may be awarded where there is no uncertainty as to whether the rights of plaintiff have been invaded even though there may be some uncertainty in respect to the amount of the damages sustained. The amount need not be proved with absolute certainty. It is enough if the evidence adduced is sufficient to enable the court or jury to make a fair and reasonable approximation. Story Parchment Co. v. Paterson Parchment Paper Co., 282 U. S. 555, 51 S. Ct. 248,

75 L. Ed. 544; Hoffer Oil Corporation v. Carpenter, 10 Cir., 34 F. 2d 589; Shannon v. Shaffer Oil & Refining Co., 10 Cir., 51 F. 2d 878; Stanolind Oil & Gas Co. v. Kimmel, 10 Cir., 68 F. 2d 520; Indian Territory Illuminating Oil Co. v. Townley, 10 Cir., 81 F. 2d 159; Excelsior Motor Manufacturing & Supply Co. v. Sound Equipment Co., 7 Cir., 73 F. 2d 725; Commonwealth Trust Co. v. Hachmeister Lind Co., 320 Pa. 233, 181 A. 787."

See also:

Sheldon v. *Metro-Goldwyn Pictures Corp.*, 106 Fed. (2) 45, 51; affirmed, 309 U. S. 390.

Eastman Kodak Co. v. *Southern Photo Materials Co.*, 273 U. S. 359;

Sinclair Refining Co. v. *Jenkins Petroleum Process Co.*, 289 U. S. 689, 697;

Pieczonka v. *Pullman Co.*, 102 Fed. (2) 432, 434.

As to the evidence, the Court of Appeals says:

"It follows that the district judge should have allowed at least the damages accrued prior to trial [$1,828,971.02]. To that extent there was no element of speculation or uncertainty. See *Greenberg* v. *Paramount Publix Corporation*, 85 F. (2d) 42, 45 (C. C. A. 2). As to damages to accrue in the future, we think that the judge was unduly critical of the evidence offered by the claimant. The claimant showed what the past earnings of the system had been, and evidence of past earnings in an established business is recognized as a substantial basis for estimating future earnings. *Anvil Mining Co.* v. *Humble*, 153 U. S. 540; *Eastman Kodak Co.* v *Southern Photo Materials Co, supra; Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555; Williston on Contracts (Rev. Ed.), section 1346A." (R. 298.)

Conclusion.

The Court of Appeals was right in eliminating imponderable factors from the calculation of the value of the lost lease. It was not the intention of the Supreme Court to require proof of value beyond the bounds of foresight, under pain of denying any recovery. On the contrary, this Court issued a caution against an award of damages based on anything like a 969 year basis.

The directions of the Supreme Court have been completely followed, the prescribed requirements have been met, and the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

George W. Martin,
Counsel for Respondent.

October 17, 1940.

APPENDIX A.

Judge Patterson says in his Opinion (R. 300; 109 Fed. (2d) 572):

> "In the present case the evidence suffices for exercise of an informed and reasoned judgment on the probable earnings in the future. Having in mind the character of the property, the territory served, the history of operations down to the time of the trial, the general economic conditions under which past operations have been conducted, and the other factors in the case, we conclude that performance of the property for eight years beyond 1938 was predictable with a fair degree of certainty. This will allow the claimant damages for eleven years subsequent to rejection of the lease, the three years prior to trial for which damages are known and eight more years for which damages are estimated according to past experience for 14 years. The difference between agreed rent and rental value on this basis, discounted to present worth at the time of rejection, amounts to $4,411,837.61. The claim for damages on rejection of lease should have been allowed in that amount."

This means the damages were calculated according to Exhibit X-2D (R. 236), which is the Exhibit recording the experience period for 14 years. The agreed rent for the 11-year period used amounted to $9,194,676.59 (Line 11 of Column 4 of Exhibit X-2D). Columns 5 and 6 of that Exhibit give the rental value: Column 5 by years, and Column 6 accumulative. In calculating Columns 5 and 6, the sum of $589,551. was used as an annual rental value for the years 1939-75 inclusive (See notes to Exhibit X-2D, R. 239). The statement on page 238 of the Record explains the use of the three factors which make up the rental value under the Opinion of the Supreme Court: the sinking fund in-

come, the net operating income and the sinking fund payments. It was conceded in the Landlord's Brief before the Court of Appeals that Columns 5 and 6 should have been calculated, using the sum of $618,004.61 as the rental values for the years 1939-75 inclusive, instead of $589,551. The reason for this was that the figures supplied by the New Haven Railroad were repudiated by them after the Exhibit was made up and other figures were substituted which made the change necessary (Ex. Y-1, R. 256).

If Columns 5 and 6 are re-calculated, accordingly, it will be found that Line 11 of Column 6 of Exhibit X-2D should be $4,782,838.98. If this figure is then subtracted from $9,194,676.59 listed above, the difference is $4,411,837.61, which amount is the damages calculated by Judge Paterson. If the first eleven lines of Columns 5 and 6 were recalculated using the figure $618,004.61 as the rental value for the years 1939-46, these columns would read as follows:

		Col. (5)	*Col. (6)*
1	1936	$435,372.50	$ 435,372.50
2	1937	356,645.33	792,017.83
3	1938	291,825.40	1,083,843.23
4	1939	528,272.93	1,612,116.16
5	1940	507,954.74	2,120,070.90
6	1941	488,418.02	2,608,488.92
7	1942	469,632.71	3,078,121.63
8	1943	451,569.92	3,529,691.55
9	1944	434,201.84	3,963,893.39
10	1945	417,501.77	4,381,395.16
11	1946	401,444.01	4,782,838.98

Col. (4)	$9,194,676.59
Less Col. (6)	4,782,838.98
	$4,411,837.61 revised damages.

APPENDIX B.

Calculation of the Rental Value.

The rental value is the factor which is subtracted from the rent in order to find the landlord's damages. Under the opinion of the Supreme Court, the factor of rental value is composed of *two items besides the net earnings.* In affirming the dismissal of the New Haven's counterclaims, the Court said:

> "The betterments and sinking funds having come into the possession of the lessors by the terms of the lease are not to be considered as offsets against the claim of the lessor. Their possession by the lessor increases the earning power of the assets to the benefit of the lessee," (305 U. S. 505).

Obviously the "betterments" automatically swell the net earnings without further adjustment. Three-quarters of the sinking fund, as of the date of the rejection of the lease, had been built up by annual amortization instalments paid into it by the New Haven pursuant to the terms of the lease.

I.

Interest from Sinking Fund.

Three-quarters of the C. R. & L. sinking fund to secure its outstanding 4½% bonds amounted, at petition filed, to $125,755.96 in cash, and $3,369,750. in C. R. & L. bonds. Applying the cash to the purchase of additional bonds results in three-quarters of the sinking fund, on January

1, 1936, containing $3,489,518. in bonds. The annual interest on these bonds would be $157,028.13 (Ex. X-5; R. 76, 244).

The bonds in the sinking fund, therefore, produced, as interest, $157,028.13; and the money to purchase these bonds was contributed by the New Haven, pursuant to the lease (R. 22), and so "the earning power of the assets" is thus increased by that much annually. This amount, therefore, is credited to the New Haven by adding to it the annual rental value of the property. The amount cannot change for the lease has been terminated by rejection; and the New Haven will never, after petition filed, again contribute anything further to the sinking fund (R. 158). To the extent that capital contributions were made before that time, the increased earning power of the fund benefits the lessee in the same way that betterments in the physical property do. If additions to the fund should be hereafter made by others that is no reason for awarding further benefit to the New Haven.

So, this item of rental value is fixed at $157,028.13 annually (R. 273).

II.

Payments to Sinking Fund.

The sinking fund was built up by annual instalments contributed by the New Haven. The New Haven, having rejected the lease, has lost the right to recoup these payments by the refunding operation which it agreed to perform in 1951 (R. 23), and the fund now belongs to claimant. All courts agree as to this.

Nevertheless the stipulated rent was fixed at an amount to provide for these amortization payments, three-quarters of which amounted to $49,713.75 annually (Ex. X-1; R. 66, 220); and it does not seem fair to require the New Haven to continue payments into a sinking fund which it has lost the right to recapture. And so, in all the calculations involving rental value submitted by claimant this item, too, has been added and credited to the New Haven. When the possibility of any reduction in the rent by reason of refunding by the New Haven became extinct, the liability to contribute further to the sinking fund should likewise become extinct, and the parties' reciprocal liabilities should be calculated accordingly.

So, this item of rental value is fixed at $49,713.75 annually (R. 272).

III.

Operating Income.

The third constituent composing rental value is the net operating income from the demised properties. The actual operating figures are available only for the years 1936, 1937 and 1938 (and thirteen days in 1935). The reason for this is that, previous to the rejection of the lease on December 18, 1935, the claimant's properties were operated by The Connecticut Company (the New Haven's subsidiary) as an undivided component of the entire properties operated. After the rejection of the lease, the Court directed that separate accounts be kept covering the claimant's properties and those owned by The Connecticut Company; and this was done (R. 268). The separate fig-

ures, therefore, are available for the three years mentioned; 1936 reflecting operation by The Connecticut Company—until November 16, 1936 (when the properties were surrendered to claimant), and 1937 and 1938 reflecting operation by claimant. These three years, accordingly, furnish net operating income figures based on actual past fact, and involve no *nunc pro tunc* allocations or apportionments.

This is the reason why all the series of X-2 Exhibits have the same figures in the first three lines of Columns (5), (6), (7), and (8). These figures are derived from three constants and one variable—all based on past facts; the rent reserved (a constant), from which is subtracted the bond interest, $157,028.13 (a constant), *and* the amortization instalment, $49,713.75 (a constant), *and* the actual operating income for each of the three years respectively (a variable) as shown in the Statement attached to each of the X-2 Exhibits. The whole has been discounted back to January 1, 1936, at 4%.[3]

It is not till the fourth line of the Columns that forecasting is necessary, and then only in connection with the one factor which is a variable. That one factor has got to be made a constant if it is to be used in a mathematical series. When it is reduced to a constant by the application of an

---

[3] This date is 13 days after rejection of the lease. It is taken because it enables the use of calendar years in making the calculations. The rate of discount, 4%, is the reasonable value of money (Ex. X-8, X-9, X-10; R. 246-252, 270). *Briscoe* v. *United States*, 65 Fed. (2) 404; *S. S. Black Gull*, 90 Fed. (2) 619; *C. & O. Ry. Co.* v. *Kelly*, 241 U. S. 485 (R. 74).

average, it will not be mathematically accurate. It cannot be. It need not be.

1 *Sutherland on Damages* (4th Ed.), § 121;
Schell v. *Plumb*, 55 N. Y. 592, 598;
Rugg v. *Rohrbach*, 110 Ill. App. 532;
Treat v. *Hiles*, 81 Wis. 280;
17 *Corpus Juris*, 757;
Ward v. *General Ice Cream Corp.*, 172 At. 781, 782; 118 Conn. 363, 366;
Re Schulte-United, Ltd. [1934], 4 Dominion Law R. 51;
Re: Metropolitan Chain Stores, 66 Fed. (2) 485, 487;
Eastman Co. v. *So. Photo Co.*, 273 U. S. 359, 378;
Story Parchment Co. v. *Paterson Co.*, 282 U. S. 555.

The principle is the same in tort and in contract.

5 *Williston on Contracts* (Rev. Ed.) § 1317;
Shannon v. *Shaffer Oil & Refining Co.*, 51 Fed. (2) 878, 881;
Martins Fork Coal Co. v. *Harlan-Wallins Coal Corp.*, 83 Fed. (2) 967, 969.

Even though the average net earnings were accurately ascertained to the last decimal place over any given period of time *previous* to rejection of the lease, the result is submitted for consideration in estimating damages accruing for a period *after* rejection. The past is the only index of the future, and in tort or contract is competent evidence.

United Electric Coal Co. v. *Rice,* 22 Fed. Supp. 221, 226;
5 *Williston on Contracts* (Rev. Ed.), § 1346A.

The variable, net earnings, is reduced to a constant annual average over various periods of past time by the application of various formulas, and the result in each calculation is shown in the X-2 series of Exhibits.

The Court of Appeals, for the reasons stated in its opinion (R. 299) chose Exhibit X-2D where the experience period on which the estimates of future net income were based was 14 years (R. 138). The figures for the net operating income were supplied by the New Haven and then repudiated. The first figures thus supplied totaled $5,359,325; the second figures totaled $5,458,787 (Ex. Y-1, R. 256). The total net income from the "controversial bus routes" for the period as reported by the New Haven came to $298,888.78 (Ex. Y-2, R. 258); which is added to $5,458,877, making a total net operating income for the 14 year period of $5,757,675.78. Dividing this total by the number of years in the period—14—gives a "normal year" operating income of $411,262.55 instead of $382,809 (Ex. X-2DD). Adding the new operating income average to the other two factors in statement annexed to Ex. X-2DD, gives $618,004.61 as the rental value, instead of $589,551. Thus, the error arising from the use of erroneous figures in the first instance is 4.6%: that is, the rental value is but 95.4% of what it "ought to be." The correction has been made by Judge Patterson in arriving at his result.

Blank Page

FILE COPY

Office - Supreme Court, U. S.
FILED
OCT 19 1940
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1940.

No. 38.

HOWARD S. PALMER, JAMES LEE LOOMIS AND HENRY B. SAWYER, TRUSTEES OF THE PROPERTY OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, *Petitioners*,

v.

CONNECTICUT RAILWAY AND LIGHTING COMPANY.

MOTION AND BRIEF OF ROBERT G. DODGE AND TALCOTT M. BANKS, JR., AMICI CURIAE.

ROBERT G. DODGE,
TALCOTT M. BANKS, JR.,
Special Counsel for the Trustees of the Property of Old Colony Railroad Company, as Amici Curiae.

ANDERSON D. GRISWOLD & SON, LAW PRINTERS, BOSTON.

Blank Page

INDEX.

	Page
Motion	1
Brief	3
Preliminary statement	3
Argument	4
I. The formula for the measure of damages	5
II. The valuation of long-term leases	6
A. Tax cases	7
B. Eminent domain cases	10
C. Contract cases	11
III. The decision of the Circuit Court of Appeals	13
IV. The proof of rental value	16

TABLE OF AUTHORITIES CITED.

A. H. Woods Theatre Co. v. Commissioner, 12 B.T.A. 827	9n.
A. J. Richey Corporation v. Garvey, 132 Fla. 602	12
Appeal Tax Court of Baltimore v. Western Md. R.R. Co., 50 Md. 274	8n.
Bogg v. Midland Railway Company, L.R. 4 Eq. 310	10
Bondy v. Harvey, 218 App. Div. 126	11
Bowman Hotel Corp. v. Commissioner, 24 B.T.A. 1193	6n.
Cannon v. Wilbur, 30 Neb. 777	5n.
Carlock v. United States, 53 F. (2d) 926	5n.
City Bank Farmers Trust Co. v. Irving Trust Co., 299 U.S. 433	5n.
Commonwealth v. Delaware, Lackawanna and Western Railroad Company, 145 Pa. St. 96	8
Connecticut Railway and Lighting Company v. Palmer, 305 U.S. 493	4, 5, 12, 13, 15n., 16

Page

Connecticut Railway and Lighting Company v. Palmer, 95 F. (2d) 483 14n.
Consolidated Investment Co. v. Commissioner, 13 B.T.A. 1252 9n.
Corrigan v. City of Chicago, 144 Ill. 537 5n.
Delancey Street, In re, 120 App. Div. 700 10
Friend v. Commissioner, 102 F. (2d) 153 7, 16
Hotel Wisconsin Realty Co. v. Commissioner, 16 B.T.A. 334 9n.
Irving Trust Co. v. Perry Co., 293 U.S. 307 5n., 15n.
James Bldg. Co. v. Commissioner, 22 B.T.A. 658 9n.
King v. King, 83 Wash. 615 5n.
Kuehner v. Irving Trust Co., 299 U.S. 445 5n.
Leslie v. Crommelin, Irish Rep. 2 Eq. 134 12n.
L. S. Donaldson Co. v. Commissioner, 12 B.T.A. 271 9n.
Martha Realty Co. v. Commissioner, 22 B.T.A. 342 9n.
McIntosh v. The Pontypridd Improvements Co., Ltd., 61 L.J. Q.B. 164 (affirmed 8 T.L.R. 203, C.A.) 10
Meadows v. Irving Trust Company, 299 U.S. 464 12
Metropolitan Building Co. v. King County, 62 Wash. 409 9n.
Morgan v. London and Northwestern Railway Co., [1896] 2 Q.B. 469 11
Newman Theatre Co., Appeal of, 4 B.T.A. 390 9n.
New York, New Haven and Hartford R.R., In re, 98 F. (2d) 670 14n.
New York, New Haven and Hartford Railroad Company, In re, 30 F. Supp. 541 3, 4, 17, 19
Northern Hotel Co., Appeal of, 3 B.T.A. 1099 9n.
Ocean Grove Camp Meeting v. Reeves, 79 N.J.L. 334, affirmed 80 N.J.L. 464 8n.
Oldfield v. Angeles Brewing & Malting Co., 62 Wash. 260 6n.
Palmer v. Palmer, 305 U.S. 578 14n.

	Page
Park Site, In re, 247 Mich. 1	11
Pennsylvania Steel Co. v. New York City Railway Co., 165 Fed. 459; 165 Fed. 472; 176 Fed. 471	8n.
People ex rel. Delaware & Hudson Canal Co. v. Feitner, 61 App. Div. 129 (affirmed on the opinion below, 171 N.Y. 641)	7
People ex rel. Gorham Mfg. Co. v. State Tax Commission, 197 App. Div. 852	9n.
People ex rel. Metropolitan Street Railway Co. v. Barker, 121 App. Div. 661 (affirmed on the opinion below, 200 N.Y. 509)	7
Philadelphia, W. & B. R.R. Co. v. Appeal Tax Court of Baltimore, 50 Md. 397	8n.
Plumb v. Commissioner, 7 B.T.A. 295	5n.
Secor Hotel Company, Appeal of, 7 B.T.A. 158	5n.
Steele Wedeles Co. v. Commissioner, 11 B.T.A. 279	9n.
Urban Properties Co. v. Irving Trust Co., 74 F. (2d) 654	12
Williams v. Burrell, 1 C.B. 402	12
Wm. Filene's Sons Co. v. Weed, 245 U.S. 597	5n.
Bankruptcy Act of 1938, Secs. 63(9), 202, 353, 458 and 642, 11 U.S.C. Secs. 103(9), 602, 753, 858 and 1042	12n.
Bankruptcy Act, Sec. 77	4, 7, 11, 20
Bankruptcy Act, Sec. 77B	12
Fisher and Neihuss, Catalog of Long-Term Leases in Detroit (1929) 2 Mich. Bus. Studies, Pamphlet 5	6n.
Fisher and Neihuss, Problems of Long-Term Leases in Detroit (1929) 2 Mich. Bus. Studies, Pamphlet 8	6n.
McMichael, Long and Short Term Leaseholds (3d ed., 1925) chapter I	6n.
Meck and Masten, Railroad Leases and Reorganization (1940), 49 Yale L.J. 626	6n.

	Page
Statistics of Railways in the United States (1938 ed.), Interstate Commerce Commission, p. S-112, 220-222	7n.
Statistics of Railways in the United States (1938 ed.), Interstate Commerce Commission, at p. 218	8n.
The Long Term Ground Lease: A Survey (1939) 48 Yale L.J. 1400, notes 1-2	6n.
Williston on Contracts (revised ed.) section 1405	6n.

Supreme Court of the United States.

OCTOBER TERM, 1940.

No. 38.

HOWARD S. PALMER, JAMES LEE LOOMIS AND HENRY B. SAWYER, TRUSTEES OF THE PROPERTY OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, *Petitioners*,

v.

CONNECTICUT RAILWAY AND LIGHTING COMPANY.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE.

May it Please the Court:

The undersigned, Special Counsel for Howard S. Palmer, James Lee Loomis and Henry B. Sawyer, as Trustees of the Property of Old Colony Railroad Company, respectfully move this Honorable Court for leave to file the accompanying brief in this case as *amici curiae*.

ROBERT G. DODGE,
TALCOTT M. BANKS, JR.,
Special Counsel for the TRUSTEES OF THE PROPERTY OF OLD COLONY RAILROAD COMPANY, as *Amici Curiae*.

Blank Page

Supreme Court of the United States.

OCTOBER TERM, 1940.

No. 38.

HOWARD S. PALMER, JAMES LEE LOOMIS AND HENRY B. SAWYER, TRUSTEES OF THE PROPERTY OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, *Petitioners,*

v.

CONNECTICUT RAILWAY AND LIGHTING COMPANY.

BRIEF OF ROBERT G. DODGE AND TALCOTT M. BANKS, JR., AMICI CURIAE.

Preliminary Statement.

This brief is filed by Special Counsel for the Trustees of the Property of Old Colony Railroad Company (hereinafter called "Old Colony"), who have a claim against the estate of The New York, New Haven and Hartford Railroad Company (hereinafter called "New Haven") for disaffirmance of a railroad lease with an unexpired term of fifty-six years.

For its bearing on the ques ion of law which the case at bar presents reference is made to *In re New York, New Haven and Hartford Railroad Company,* 30 F. Supp. 541, the decision in the District Court allowing Old Colony's claim for the loss of its lease. While the Old Colony case is

not now before this Court, it is believed that the lower court decision illustrates the proper application of the rule prescribed by this Court in *Connecticut Railway and Lighting Company* v. *Palmer*, 305 U.S. 493, 504, that the lessor's damages should be measured by

> ". . . the present value of the rent reserved less the present rental value of the remainder of the term."

In the decision referred to the District Judge found upon ample and uncontroverted evidence that the remainder of the term was without any "present rental value" whatever, and he therefore awarded as damages "the present value of the rent reserved."

The Circuit Court of Appeals in the case at bar has followed a different principle. It has awarded the claimant in effect an allowance based on a residual term of 11 years, when the lease actually had, at disaffirmance, 969 years to run. While the full scope of this ruling is not wholly clear, it appears to assume that making a reasonable valuation of a long term is legally impossible. Further, it seems to regard the process of valuation primarily as one of adding up assumed values for each future year to the furthest point where a court may risk prediction. In both these respects, it is contended, the Circuit Court of Appeals erroneously interpreted and applied the controlling decision of this Court.

Argument.

It is submitted that there is no rule of law which makes it impossible under Section 77 of the Bankruptcy Act to evaluate a long unexpired term, or to award the lessor of a disaffirmed lease damages for the full loss suffered if established as in the case of *In re New York, New Haven and Hartford Railroad Company*, 30 F. Supp. 541.

I. The Formula for the Measure of Damages.

In *Connecticut Railway and Lighting Company* v. *Palmer* this Court stated the rule by which damages are computed:

> ". . . the present value of the rent reserved less the present rental value of the remainder of the term."[1]

This formula has been frequently approved by this Court,[2] and its use is universal where damages for loss of a lease are allowed to a landlord.[3]

The difference between the discounted rents reserved and the present rental value of the premises for the period in issue is an exact and literal measure of the value of any specific term for years. If the rent reserved exceeds the present rental value, then rent-less-rental value states the worth of the lease to the landlord; whereas if the situation is the other way, and the term is worth more than the rent reserved, rental value-less-rent measures the value of the lease to the lessee. This method of measuring is therefore employed wherever the value of a term, or part of a term, to either lessor or lessee is to be determined, as in tax cases,[4] cases of eminent domain [5] and cases involving unlawful termination of a lease by the lessor [6] or breach of a contract to

---

[1] 305 U.S. 493, 504.

[2] *Wm. Filene's Sons Co.* v. *Weed*, 245 U.S. 597, 602; *Irving Trust Co.* v. *Perry Co.*, 293 U.S. 307, 311; *City Bank Farmers Trust Co.* v. *Irving Trust Co.*, 299 U.S. 433, 443; *Kuehner* v. *Irving Trust Co.*, 299 U.S. 445, 450.

[3] This is true in England and the United States; see *Connecticut Railway and Lighting Co.* v. *Palmer*, 305 U.S. 493, 504, and cases cited at p. 504, notes 21 and 23.

[4] *Appeal of Secor Hotel Company*, 7 B.T.A. 158, 162; *Plumb* v. *Commissioner*, 7 B.T.A. 295, 298. See also pages 7-9, *infra*.

[5] *Carlock* v. *United States*, 53 F. (2d) 926, 927-928 (Ct. App., D.C.); *Corrigan* v. *City of Chicago*, 144 Ill. 537, 548-549. See also pages 10-11, *infra*.

[6] *King* v. *King*, 83 Wash. 615, 620; *Cannon* v. *Wilbur*, 30 Neb. 777, 782. See also page 12, *infra*.

take, or give, a lease.[7] There is, indeed, no other adequate method for appraising the fair value of a term, or for computing the damages suffered when a term is destroyed.

II. The Valuation of Long-Term Leases.

The long-term lease has been familiar for centuries in English law.[8] Its general adoption in this country has been relatively slow, but in the past half century its usefulness has been increasingly recognized. It has become one of the chief instruments for financing urban office building construction in large cities and has played a prominent part in the construction of the nation's systems of railroads.[9] In railroad finance the lease has been favored particularly because it permitted acquisition of a line without the great initial expense involved in outright purchase, and the value of the railroad properties which Class I railroads have under

---

[7] *Oldfield* v. *Angeles Brewing & Malting Co.*, 62 Wash. 260, 263. Williston on Contracts (Revised ed.) section 1405. See also pages 11-12, *infra*.

[8] See McMichael, Long and Short Term Leaseholds (3d ed., 1925) chapter I. *The Long Term Ground Lease: A Survey* (1939) 48 Yale L.J. 1400.

[9] Almost half the business district in Chicago is built upon land subject to long-term leases. Over 240 such leases, covering many important properties, were recorded in Detroit in the period 1900-1929. In New York buildings such as Rockefeller Centre, the Chrysler Building, the Waldorf-Astoria and Commodore Hotels and Wanamaker's Store are held under long-term leases. *Bowman Hotel Corp.* v. *Commissioner*, 24 B.T.A. 1193. *The Long Term Ground Lease: A Survey* (1939) 48 Yale L.J. 1400, notes 1-2. Fisher and Neihuss, *Catalog of Long-Term Leases in Detroit* (1929) 2 Mich. Bus. Studies, Pamphlet 5. Fisher and Neihuss, *Problems of Long-Term Leases, id.*, Pamphlet 8. For railroad leases, see Meck and Masten, *Railroad Leases and Reorganization* (1940), 49 Yale L.J. 626.

lease has been recently estimated as approximately four and one-half billion dollars.[10]

No reason appears why the value of a long-term leasehold cannot be determined under Section 77 of the Bankruptcy Act as well as it can be in a tax case, or a condemnation case, or an action of contract. In these classes of cases the task has been undertaken in any number of different sets of circumstances.

A. Tax Cases.

There are many instances where long-term leases must be valued for tax purposes, and the courts have shown no hesitation in requiring such valuation or in approving values arrived at on a basis of substantial evidence.

Findings of the values of leaseholds expiring in 1985, made for the purpose of calculating a tax on gains from sales, were approved by the court in *Friend* v. *Commissioner*, 102 F. (2d) 153 (C.C.A. 7).

In *People ex rel. Delaware & Hudson Canal Co.* v. *Feitner*, 61 App. Div. 129 (affirmed on the opinion below, 171 N.Y. 641), the court ordered a reassessment of the "actual value" of two railroad leases, having respectively about 100 and 500 years to run, for the purpose of calculating a capital stock tax. The same tax was involved in *People ex rel. Metropolitan Street Railway Co.* v. *Barker*, 121 App. Div. 661 (affirmed on the opinion below, 200 N.Y. 509), where the valuation of nine street railway leases[11] was in issue, the court stating (121 App. Div. at p. 663):

---

[10] Statistics of Railways in the United States (1938 ed.), Interstate Commerce Commission, p. S-112. The New York Central System alone has more than 30 such leases, ranging from small terminal properties to the 1600 miles of the "Big Four," which was leased in 1930 for a 99-year term. *Idem*, pp. 220-222.

[11] The opinion does not give the terms of these leases, but it is probable that they included the 999-year lease of the Harlem Rail-

". . . But it was the value of these leases to the lessee on the second Monday of January, 1897, that was in controversy, and the defendants were required to fix the actual value of the leases as the property of the relator subject to taxation. The actual value of the leases was to be ascertained, as is the actual value of other property when required to be ascertained in a judicial proceeding."

In the case of *Commonwealth* v. *Delaware, Lackawanna and Western Railroad Company,* 145 Pa. St. 96, the lessee's interest in a perpetual railroad lease [12] was found to have a value of one million dollars, and the taxpayer established this value as an exemption in the computation of the Pennsylvania tax upon its capital stock.

A lessee's interest in a long-term lease may be subject to a property tax, and this presupposes that it can be reasonably valued. Thus the Court of Appeals of Maryland has in two cases required the assessment of lessees' interests held by railroads in property in Baltimore, under 99-year leases renewable forever,[13] the valuation to be made "subject to the rent reserved"—*i.e.,* the rent to be deducted from the rental value.

---

road Company, the lease of the "Belt Line" which then had a residual term of 63 years, and other leases for long terms, referred to in the Metropolitan Street Railway Company receivership litigation. See *Pennsylvania Steel Co.* v. *New York City Railway Co.,* 165 Fed. 459; *idem,* 165 Fed. 472, 474; *idem,* 176 Fed. 471, 473.

[12] The terms of this lease from the Warren Railroad to the Lackawanna are summarized in Statistics of Railways in the United States (1938 ed.), Interstate Commerce Commission, at p. 218.

[13] *Appeal Tax Court of Baltimore* v. *Western Md. R.R. Co.,* 50 Md. 274, 298; *Philadelphia, W. & B. R.R. Co.* v. *Appeal Tax Court of Baltimore,* 50 Md. 397, 410, 413. The market value of a 99-year lease, renewable forever, was also assessed for a property tax in *Ocean Grove Camp Meeting* v. *Reeves,* 79 N.J.L. 334, affirmed 80 N.J.L. 464.

The Supreme Court of Washington, approving the reduction of a property tax assessment of a 50-year term, said: [14]

> "In determining the worth of a leasehold the courts have universally held that it is the value of the term less the rent reserved. The value of the term is fixed with reference to present as well as prospective conditions . . ."

Additional cases of the valuation of long-term leaseholds are found in connection with a mortgage tax,[15] the determination of a proper basis of invested capital under the Federal income tax laws,[16] and, under the same laws, the fixing of an allowance for depreciation or exhaustion of a leasehold by which the taxpayer, if successful in proving that the leasehold has a definite value, may reduce his annual tax assessment.[17]

---

[14] *Metropolitan Building Co.* v. *King County,* 62 Wash. 409, at p. 410.

[15] *People ex rel. Gorham Mfg. Co.* v. *State Tax Commission,* 197 App. Div. 852, involving leases continuing or renewable for 50-60 years.

[16] E.g., *Appeal of Newman Theatre Co.,* 4 B.T.A. 390 (three leases, all having unexpired terms over 95 years); *A. H. Woods Theatre Co.* v. *Commissioner,* 12 B.T.A. 827 (99-year lease); *Consolidated Investment Co.* v. *Commissioner,* 13 B.T.A. 1252 (90- and 99-year leases, valued as of two different dates); *Martha Realty Co.* v. *Commissioner,* 22 B.T.A. 342 (99-year lease, valued as of two different dates).

[17] E.g., in addition to the cases cited in note 16, *supra, Appeal of Northern Hotel Co.,* 3 B.T.A. 1099 (76-year unexpired term); *Steele Wedeles Co.* v. *Commissioner,* 11 B.T.A. 279 (80-year unexpired term); *L. S. Donaldson Co.* v. *Commissioner,* 12 B.T.A. 271 (four 73-year unexpired terms and four 95-year unexpired terms); *Hotel Wisconsin Realty Co.* v. *Commissioner,* 16 B.T.A. 334 (97-year unexpired term); *James Bldg. Co.* v. *Commissioner,* 22 B.T.A. 658 (three 98-year unexpired terms).

B. Eminent Domain Cases.

When leased property is taken for public use, the lessee as well as the lessor is entitled to be compensated for the loss of his interest. He is, therefore, required to establish by satisfactory proof that the lease has a definite value to him. Here, too, the courts have accepted as proper the valuation of long unexpired terms.

In the case of *In re Delancey Street,* 120 App. Div. 700, where a total term of 59 years including renewals was to be valued, the court said:

> "What is to be ascertained is the fair market value of the lease. Undoubtedly all the elements of a lease can be considered, and in addition the testimony of experts, who are to testify as to the market value of the lease, with the covenants, conditions and obligations imposed upon the landlord and the tenant, and it is this market value to which he is entitled." [18]

The valuation of a 47-year unexpired term, on three alternative constructions, was involved in *McIntosh* v. *The Pontypridd Improvements Co., Ltd.,* 61 L.J. Q.B. 164 (affirmed 8 T.L.R. 203, C.A.), and, upon settling the questions of law on which the alternatives depended, one of the valuations was approved by the High Court of Justice.

In *Bogg* v. *Midland Railway Company,* L.R. 4 Eq. 310, compensation for the loss of a 26-year residue was ascertained by valuation, and the Vice-Chancellor overruled a demurrer to a bill seeking additional compensation for a renewal term, which would extend the residue to an 82-year total.

---

[18] 120 App. Div. at p. 708. At p. 705 the court said of this subject: "The fact that to ascertain such a value involved more or less difficulty is no reason why it should not be fairly met and determined."

The 30-year unexpired term of a 99-year lease was valued in *Morgan* v. *London and Northwestern Railway Co.*, [1896] 2 Q.B. 469.

The Supreme Court of Michigan, confining a lessee's compensation for loss of an unexpired term of 24 years to $280,000, the "value of the leasehold interest," said:

> "Where an entire leasehold interest is taken, it is a sensible and just rule that confines the damages to the fair market value of the lease, and, in case of exceptional circumstances where it has no market value, then the damages are the actual value. In estimating the value, it is proper to consider the location of the premises, their special adaptability to the business there being conducted, the length of time it has been established, its earnings and profits, the unexpired term of the lease, and every other fact that may affect its value. All of these matters go to enhance the value of the lease. They are not substantive elements of damages in condemnation proceedings."

In re Park Site, 247 Mich. 1, at p. 4.

C. Contract Cases

A situation closely similar to that created by disaffirmance of a lease under Section 77 is found when a contract to take, or give, a lease is broken. Damages are measured by the same rule; the right to their recovery makes such contracts enforceable. In these cases no suggestion appears that the courts will refuse full damages because of the length of a term.

A contract to give a 99-year lease was broken in the case of *Bondy* v. *Harvey*, 218 App. Div. 126, and damages were awarded on the basis of the difference between rental value and rent, although the case was sent back for failure

to deduct a proper discount. See also *A. J. Richey Corporation* v. *Garvey*, 132 Fla. 602.

In *Williams* v. *Burrell*, 1 C.B. 402, tenants holding under two leases limited to three lives or 99 years were evicted after 37 years of their terms had run, and they were held entitled to damages for the loss of the unexpired term. This presents the converse of the typical disaffirmance situation.[19]

The amendments to the Bankruptcy Act are too recent for many cases involving long-term leases to have reached appellate courts as yet, but it may be observed that this Court, in *Meadows* v. *Irving Trust Company*, 299 U.S. 464, expressly contemplated that under the former Section 77B proof of a claim for loss of a lease having an unexpired term of 89 years could be made (299 U.S. at pp. 466, 467). The fact that Section 77B set an outside limit of 3 years rent plus accruals did not alter the necessity of basing the proof upon the universal formula of rent reserved less rental value of the whole remaining term, for that must first be computed before the limitation can become operative, as is likewise true under every section of the Bankruptcy Act of 1938 where a limit on damages is established.[20]

The 969-year unexpired term in the case at bar has, of course, already been before this Court in *Connecticut Railway and Lighting Company* v. *Palmer*, and, although the difficulty of proving its value was emphasized, the possibility

---

[19] See also *Leslie* v. *Crommelin*, Irish Rep. 2 Eq. 134, involving the difference between a life estate and a lease for three lives or 31 years.

[20] Bankruptcy Act of 1938, Sections 63(9), 202, 353, 458 and 642, 11 U.S.C. Sections 103(9), 602, 753, 858 and 1042. In *Urban Properties Co.* v. *Irving Trust Co.*, 74 F. (2d) 654 (C.C.A. 2), the value of a 25-year term was fixed for the purpose of a claim in bankruptcy (pp. 655, 666), but, since the Act had not as yet been amended, the claim was disallowed.

that satisfactory proof could be made was plainly recognized, for this Court remanded the case for further proceedings in the District Court, saying (305 U.S. at p. 503):

> "Notwithstanding its extended term, the lease created an obligation under the present Bankruptcy Act upon the New Haven entitled to share in its assets upon reorganization on an equality with the claims of other creditors."

The valuation of long-term leases is a relative commonplace in the business world. In the hundreds of instances of railroad leases, and the many thousands of cases where other properties have been leased for long terms, both parties have necessarily considered the subject in reaching an agreement. The elements of value which contribute to an informed business judgment on this question are the same as those which the courts have weighed in the numerous cases where the valuation of long-term leases has been the subject of judicial consideration. The element of discount, which makes reasonable business judgment possible in long-term matters, also facilitates a court's determination of value, for it renders the first few years of far greater importance than the later years, while the remote years of the term have little if any appreciable effect upon present values.

III. The Decision of the Circuit Court of Appeals.

The basis of the Circuit Court of Appeals' decision appears in this sentence:

> "In effect, the law for purposes of damages treats a lease with 969 more years to run as if it were only for a term within the reach of fairly definite forecast; the unpredictable stretch beyond is disregarded." (109 F. (2d) at p. 571.)

The only case which the court cited as immediate authority for this novel principle is its own earlier decision on Old Colony's claim,[21] subsequently reversed. The court awarded the claimant, on this theory, damages representative of rent less rental value for a term of 11 years, 3 past at the time of trial and 8 then in the future.

The promulgation of this new rule was quite clearly an effort to justify some award for an apparent loss where proof of the amount is not easy. But the court proceeded to place a value on a property interest entirely different from the unexpired term of 969 years which should have been valued. Furthermore, it dealt with the question as one of damage accruing year by year, involving the problem of computing yearly sums and adding them, and it was balked by the vain task of calculating the annual amounts for more than a few years. Of course it is impossible to forecast accurately how much the worth of a transportation property, or a property of any sort, might fall below a specified rental at any particular date in the future, whether it be 5 years ahead or 50; but that is hardly the point in issue. The question is one of present damage, and it depends on the "present rental value of the remainder of the term," not on the future rental values of all the future years. The actual damage of the landlord is suffered all at once: he loses, at the moment of rejection, the whole value to him of a certain definite term for years—the residue of the original lease, and that is susceptible of legal valuation no matter how extended it may be.

---

[21] *In re New York, New Haven and Hartford R.R.*, 98 F. (2d) 670 (C.C.A. 2). The opinion in that case contained an intimation that a similar rule might have been adopted had the court not been bound by its original ruling on Connecticut Railway and Lighting Company's claim (*Connecticut Railway and Lighting Company* v. *Palmer*, 95 F. (2d) 483). The decision was reversed in *Palmer* v. *Palmer*, 305 U.S. 578.

In valuing the landlord's interest in a term the future must be weighed, all relevant circumstances, both past and present, considered, and expert opinion usually consulted, but the result is a determination of the reasonable value to the lessor of the whole remaining term, the amount by which the rent reserved exceeds the rental value—not a series of annual assessments [22] of possible damage running forward to a point where a party, or a court, yields to the impossibility of making a safe prediction.

The difficulties of appraising a long term, described in this Court's earlier opinion,[23] should not be minimized. At best the matte[illegible]ne requiring care and caution in high degree, and ordi[illegible]y extensive research; in some circumstances it may not be possible for the claimant, having the burden of proof, to establish the fact of loss. The problem, however, is not one of how far into the future one may with any assurance project a definite estimate of earnings. It is the familiar problem of determining fair value, at a given date, in view of all the circumstances existing at that time and the probabilities as to the future. It is essentially the same problem as is inherent in the determination of the value of real estate, of a business or of many other kinds of property.

---

[22] The Circuit Court of Appeals has taken essentially the same point of view as that urged upon this Court, without success, by the petitioner in the *Perry* case (293 U.S. 307). The petitioner there argued, in its brief (at p. 38), that the calculation of damages would necessarily involve an "inquiry as to the value for each of the monthly rent days for the twelve years to come" which, it was contended, would be hopelessly conjectural. This Court did not notice this argument in its opinion approving the claim computed on the usual basis, "the difference between the present fair value of the remaining rent due under the lease and the present fair rental value of the premises for the balance of the term." (293 U.S. at p. 311.)

[23] 305 U.S. 493, at pp. 504-505.

It is difficult to see how the rule of the Circuit Court of Appeals can be reconciled with the controlling decision of this Court, *Connecticut Railway and Lighting Company* v. *Palmer*. The Circuit Court of Appeals has valued, not the 969-year residue which was before it, but a curtailed term of 11 years, and has wholly misconceived the problem.

IV. The Proof of Rental Value.

The usual standards for proof of the value of long terms are well stated in *Friend* v. *Commissioner*, 102 F. (2d) 153 (C.C.A. 7), a case in which findings of the value of long unexpired terms made upon "voluminous and highly conflicting testimony of expert witnesses" were sustained:

> "The determination of value involves a question of discretion, calling for sound and reasonable judgment, having as its basis due and proper consideration of all relevant facts and circumstances. The uncontradicted opinions of expert witnesses are not conclusive, but the Board may not arbitrarily ignore or discredit their testimony. Their testimony should be weighed in the light of the other facts developed in the case." (P. 156.)

In the case at bar the claimant did not attempt to prove the value as of the date of rejection of the remaining term of the lease. It offered evidence only of earnings of the property for various past periods,[24] without any expert testimony, leaving the selection of a proper criterion to the District Judge, who ruled that this proof was insufficient.

By way of illustration merely as to the kind of proof which a claimant may offer, and which may well be found

[24] Except that evidence was offered of the value of its real and personal property, upon which there was founded an argument that not more than a 6½% return was likely to be permitted by the public regulatory authorities.

by the trial judge to be satisfactory, reference is made to the evidence in Old Colony's case as indicated in the opinion of the District Court (*In re New York, New Haven and Hartford Railroad Company*, 30 F. Supp. 541, at pp. 542-549).

Old Colony was fortunate in having available the entire record of the New Haven reorganization, a substantial portion of which was directly concerned with the main point involved in the claim case, the earnings value of the Old Colony properties in the past and the future. This record was a reservoir of information, of which a large part had been already tested in adversary proceedings.[25]

The very great importance of the early years, in evaluating a long term, is well illustrated in Old Colony's case. The figures reflecting the operations of all Old Colony's lines for the first 4 years of the reorganization, which had been prepared by the New Haven Trustees and consequently were not open to question, showed losses so heavy that annual earnings of a million dollars a year for each remaining year of the term would not have sufficed to cancel them.[26]

---

[25] "A wealth of relevant evidence has been presented, much of it obtained from the numerous studies of the O. C. and N. H. properties and territory made by the staff of the N. H. trustees and various independent agencies in connection with N. H.'s reorganization. Because of the availability of these studies, and the intense scrutiny to which O. C. in particular has been subjected during the reorganization proceedings, wherein the economic justification for its continued existence has been brought into question by the large losses it has sustained, it has been possible to present a record of fact of truly extraordinary breadth and detail." (30 F. Supp. at p. 544.)

[26] "In October, 1935, the leased property was faced with the immediate prospect of staggering losses as the experience of the ensuing four years has actually demonstrated. Nothing in the background of local economic trends or in the competitive situation then existed or has since occurred to justify the expectation that initial losses of such dimensions would be offset by corresponding gains within the period of the unexpired term. Indeed, counsel for the

In developing the proof of rental value, there was presented in Old Colony's behalf a comprehensive study of the traffic sources, that is, the territory which the Old Colony serves. This study embraced the history and growth of the territory, the nature of its economic and industrial development, the influences which have stimulated or retarded that development and its prospects for the future in the light of present tendencies and their underlying causes. The traffic on the lines was analyzed in great detail, revenues and expenses were broken down and the possibilities of improving operation explored. Competitive agencies, their relative strength and prospective development, were dealt with by a large amount of expert testimony, particularly as to the character and volume of traffic carried and the means available for highway and water transportation. Abandonments, the rearrangement and consolidation of lines and facilities, substitution of new equipment, future capital needs and the possibilities of affiliation with other railroads were likewise the subjects of detailed inquiry. Evidence was submitted bearing upon a proper rate of discount. All this substantive testimony was summarized and supplemented by expert opinion evidence, including that of an expert who had been given by the court heavy responsibilities in the reorganization and who had the confidence

---

claimant has pointed out that the bare operating losses for the O. C. system of $17,000,000 mentioned above as accruing up to December 31, 1939, if augmented by bond and bank interest accrued and unpaid and by other recurrent obligations for which the N. H. was liable under the lease, would increase the aggregate loss to some $23,000,000; that it would require earnings of $4.70 per share ($1,178,647 per annum above fixed charges and expenses) on O. C. stock, beginning January 1, 1940, and continuing for the entire remaining fifty-two years of the term, before the discounted value of these deficits accumulated up to December 31, 1939 would be offset; and that without a reasonable certainty of such earnings, the unexpired term as of October, 1935 was wholly without any positive rental value." (30 F. Supp. at p. 547.)

of all parties to the proceeding. As no substantial contradictory evidence was offered, and no contrary opinion expressed, the court had a clear and comprehensive record on which to found its judgment.

The conclusion of the District Judge was that the remainder of Old Colony's term had no rental value to any lessee.[27]

Where there is obviously some rental value, as in the case at bar, there is greater difficulty in establishing damages under the prescribed measure. The complete absence of rental value, as in the case of Old Colony, facilitates the proof. Yet even where rental value is demonstrable, proof of damages for the loss of a long term should not be unduly difficult. As pointed out previously, the question of the value of such a term arises whenever a long-term lease is negotiated. Problems of value which are commonly dealt with satisfactorily in ordinary business transactions, and to which the courts have found an answer on many occasions, can readily be solved by a court of bankruptcy.

The disposition of Connecticut Railway and Lighting Company's claim is not within the scope of this brief, nor is it intended to express any opinion as to the sufficiency of the claimant's proof. It is, however, urged that the decision of this Court should not be rested on the grounds stated by the court below. It is submitted that any decision should recognize as the true rule of damages that which awards a lessor the value of the whole unexpired term, not merely of

---

[27] ". . . I predicate my decision upon the entire record, which I have attempted to weigh even though space precludes its extended recital. I find, therefore, that on October 23, 1935 the property which was the subject-matter of the lease was wholly without present rental value for the unexpired term and allow this item of claim in the amount of $39,389,161, that being the present value as of October 23, 1935 of the stipulated rental for the remainder of the term computed as above indicated." (30 F. Supp. at p. 549.)

an arbitrarily selected part, and should reaffirm that for the purposes of Section 77 of the Bankruptcy Act the value of a long term may be legally ascertained.

Respectfully submitted,

ROBERT G. DODGE,
TALCOTT M. BANKS, JR.,
Special Counsel for Howard S. Palmer, James Lee Loomis and Henry B. Sawyer, as Trustees of the Property of Old Colony Railroad Company.

Blank Page

Blank Page

FILE COPY

Office - Supreme Court, U. S.
FILED
JAN 31 1941
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 38

HOWARD S. PALMER, JAMES LEE LOOMIS and HENRY B. SAWYER, Trustees of the Property of The New York, New Haven and Hartford Railroad Company, Debtor,

Petitioners,

—against—

CONNECTICUT RAILWAY & LIGHTING COMPANY,

Respondent.

Petition of Howard S. Palmer, James Lee Loomis and Henry B. Sawyer, Trustees of the Property of The New York, New Haven and Hartford Railroad Company, Debtor, for a Rehearing and

Motion that the Issuance of this Court's Mandate be Stayed Until the Final Disposition of the Case.

JAMES GARFIELD
HERMON J. WELLS
Attorneys for Petitioners.

January 29, 1941

PRESS OF GEO. H. ELLIS CO., BOSTON

Blank Page

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 38

HOWARD S. PALMER, JAMES LEE LOOMIS and HENRY B. SAWYER, Trustees of the Property of The New York, New Haven and Hartford Railroad Company, Debtor, *Petitioners,*

—against—

CONNECTICUT RAILWAY & LIGHTING COMPANY, *Respondent.*

Petition of Howard S. Palmer, James Lee Loomis and Henry B. Sawyer, Trustees of the Property of The New York, New Haven and Hartford Railroad Company, Debtor, for a Rehearing and

Motion that the Issuance of this Court's Mandate be Stayed Until the Final Disposition of the Case.

Now come the petitioners, Howard S. Palmer, James Lee Loomis and Henry B. Sawyer, as they are Trustees of the property of The New York, New Haven and Hartford Railroad Company, Debtor, by James Garfield and Hermon J. Wells, their attorneys, and respectfully pray for a rehearing of this case and a stay of mandate until final disposition thereof.

The fundamental issue before this Court was whether proof of loss for a portion of the unexpired term of a rejected lease is sufficient to establish injury and fix damages for the whole remaining term. The record contained no evidence as to the earnings or value of the unexpired term except the past earnings of the leased property. The District Court had denied recovery because there was nothing to show that earnings in the long future might not be sufficient to wipe out the current loss. The Circuit Court of Appeals had allowed as damages the difference between rent and earnings for eleven years (including eight future years for which it was willing to forecast earnings) and had "disregarded" the balance of the term.

In affirming the judgment of the Circuit Court of Appeals this Court held that proof of the loss for the first eleven years constituted proof of the fact and amount of loss for the entire unexpired term, "since the presumption is that the rent and rental value for the remainder of the term are the same". This presumption is stated to be based upon the assumption that at the time the lease was made "the parties thought the annual rent reserved and rental value were the same".[1]

It is respectfully submitted that this presumption should not be invoked for the following reasons:

I. Resort to such a presumption to aid in the proof of future losses for anticipatory breach of long term contracts is a new departure which would work a fundamental change and create uncertainty in the law of damages.

---

[1] 85 L.Ed. 283, 287; 61 S. Ct. 379, 383.

II. Uncertainty as to what presumption this Court intended to invoke will further confuse the law.

III. The decision would apply against innocent parties in reorganization and bankruptcy proceedings a presumption the only reason for which is to prevent a wrongdoer from escaping the consequences of his wrong.

IV. Resort to any such presumption to facilitate allowance of damages to a landlord is inconsistent with Section 77.

I.

Any presumption on which this Court squarely rests a decision acquires an authority for the lower Federal courts and a sanctity in other courts which will immediately establish it as a part of the general law.

Damages have for a long time been allowed for loss of future profits on anticipatory breach of executory contracts if they could be proved with sufficient certainty. The requirements of proof have become thoroughly established in both the Federal and the state courts. When the Bankruptcy Act was amended to make provable claims for loss of future rent under unexpired leases the same rules were held to apply as in other executory contract cases.[2] In its first opinion in this case this Court noted that "the difficulties of proof are well recognized", citing the Pennsylvania Steel Company cases in which damages had been dis-

[2] "The difficulties of proof are well recognized. The same rules apply to executory contracts." *Connecticut Railway & Lighting Co.* v. *Palmer*, 305 U.S. 494, 505. The statute (Section 77(b)) expressly provides the same treatment for unexpired leases as for other executory contracts.

allowed under 999 year leases because the amount was uncertain "and there was no method of making it certain".[3] It also pointed out that "the uncertainty as to the loss entailed by the abrogation of leases . . . (grows) greater as to the remainder of the term lengthens" and that the difficulties of proof are multiplied when future values must be determined in times of economic depression."[4]

In thus recognizing that there were established rules for proving future damages for loss of long term contracts, this Court gave no hint that the "difficulties of proof" might be avoided by invoking a presumption of equality between rent and rental value which would make it just as easy to prove under a long term as a short term contract. The possibility that in any given case such "difficulties" might result in a claimant's failing to produce "evidence which satisfies the mind" of the court was clearly recognized and the penalty for such failure was stated to be disallowance of damages.[5]

If in its second opinion in the same case the Court invokes a presumption as a substitute for proof, other courts will have great difficulty in knowing how to deal with problems of future damages. The only evidence here consists of past earnings. Does use of the "presumption" mean that other testimony is not necessary, that the proof need not go beyond past earnings? Is the plaintiff thus assured of some damages in all cases where he shows loss between the date of repudiation and the date of hearing? Is he relieved of all "the diffi-

---

[3] *Pennsylvania Steel Co.* v. *New York City Railway Co.*, 198 Fed. 721, 759.

[4] 305 U.S. *supra*, p. 505.

[5] "only those damages susceptible of definite proof should be allowed" 305 U.S. *supra*, p. 502.

culties of proof", or only of some of them? Is he excused from the exercise of diligence in seeking to establish his loss? What rules are the courts to follow with regard to the distance into the future for which they may predict the continuation of losses?*

These and many other problems of a novel character will confront the courts wherever damages are sought for more than a very brief unexpired term. The practical result will be a change in the law of damages permitting the plaintiff to shift the burden of proof to the defendant whenever it becomes difficult, or even inconvenient, to sustain and permitting the court to remake a contract at the behest of one party without the consent of the other.

While this case arises under Section 77 of the Bankruptcy Act and relates to a lease of real estate, there is nothing in the Court's reasoning to prevent application of the presumption to any case involving damages for future loss under any executory contract with more than a short time to run.

II.

The confusion resulting from a fundamental modification in the law of damages will be increased by the uncertainty as to exactly what presumption was invoked in this case. The presumption is said to be based on the expectations of the parties at the time the lease was made that "*for the long years ahead* the rent and

---

*In the instant case the Circuit Court of Appeals selected eight years though admitting that there was no necessary reason for just that number (R. 299-300). In *Old Colony Railroad* v. *New York New Haven and Hartford Railroad Co.* (98 Fed. 670, 672) the same court intimated that future damages might be allowed "for a period of say five or ten years, on the theory that present estimates for as long as that might have some validity."

the rental value are the same.'" This seems to mean that rent and rental value were expected to be equal for the term of the lease as a whole.

When it comes to the application of the presumption, however, the opinion seems to depart from the basic assumption upon which it was predicated, saying that "the presumption is that the rent and rental value *for the remainder of the term* are the same" and that therefore damages measured by the deficiency of rental value under the rent for a portion of the remainder may be taken as representing damages for the entire remainder.[8] Thus, the basis for the presumption would make it applicable to the entire term of the lease rather than to any fraction thereof, but the application would make it applicable to whatever fraction the Court might be considering.

The presumption is of course one of fact rather than law and is therefore rebuttable in fact. As it is stated to arise from the parties' expectation at the time the lease was made, the "fact" depends upon just what that expectation may reasonably be supposed to have been. However reasonable it may be to assume that in making a long term lease or contract the parties expected rental value to equal rent, it certainly cannot be supposed that reasonable business men expected such equality to obtain in each year or other fraction of the term. Experience shows that the factors which enter into the fixing of rental value vary from time to time both with the swings of general prosperity and depression and with the fortunes of the particular industry, locality

---

[7]85 L. Ed. 283, 287; 61 S.Ct. 379, 383-4, italics ours.

[8]Idem, italics ours.

or property. Rent ordinarily is a fixed sum which does not change from year to year. If, therefore, the parties are to be assumed to have expected that the equality between rent and rental value would apply to the term as a whole, they must also be assumed to have expected that one would be higher than the other in some parts of the term and lower in other parts.

Such being the reasonable interpretation of the parties' expectation, it is obvious that the presumption to be based on it must be that while rent and rental value will be equal for the term as a whole, rental value will vary from time to time, and will be less than rent in some years and more in others. This would mean that the parties expected that there would be periods of deficiency of rental value under rent, and that such deficiencies would be offset by periods of excess, so that over the term as a whole there would be equality. If a Court is to rely upon such a presumption, it cannot, we respectfully submit, carve out from the term a short period when earnings or rental value are less than rent and award damages for that deficiency, because by the very terms of the presumption the parties anticipated just such periods. Moreover, if the record shows that there is already an accumulated deficiency of rental value under rent (as it does in this case[9]), this presumption would lead to the conclusion that in the future such deficiency will be made up by an aggregate excess of rental value over rent.

In the case at bar there are three periods involved: (1) from the execution of the lease to its rejection (30 years); (2) from rejection to the end of the period for which the Circuit Court of Appeals awarded damages

[9] R. 271-275; Ex. Y-1 to 4, R. 256-260.

(11 years); (3) from then until the termination of the original lease (958 years).

The majority opinion assumes that the parties expected that for the whole term, i.e. from the beginning of period (1) to the end of period (3) rent would equal rental value. At the same time it makes the further assumption that in period (3) rental value will equal rent. The record shows that in period (1) rental value was less than rent. Applying both presumptions to the facts of record would necessarily lead to the conclusion that in period (2) rental value would exceed rent, a conclusion directly contrary to the decision allowing the claimant damages for that period.

If damages are to be allowed for period (2) it is impossible to justify both the presumption of equality of rent and rental value for the term as a whole and the presumption of such equality for period (3). Either it must be presumed that there will be equality for the entire term, in which case period (3) will show an excess of rental value over rent and no damages can be allowed for period (2), or it must be presumed that rent and rental value will be equal for period (3) but not for the term as a whole, a presumption which has no basis in fact and indeed is directly contrary to the basic assumption of fact made by this Court as to the expectation of the parties at the time they made the lease.

Thus the two presumptions cannot both be applied and the only one which has any basis in fact leads to a denial of damages. Only confusion can result in other cases from allowing this decision to stand.

Moreover since in this case the parties agreed that until retirement of claimant's bonds in 1951 the rent should be twice what it was to be thereafter (305 U.S. supra p. 495) they must have expected that the aggregate rental value might be less than the aggregate rent up to 1951 and on the assumption that they expected the two to be equal over the whole term it follows that they must have expected any deficiency before 1951 to be made up thereafter.

III.

This presumption, as we have said, is entirely novel in the law of damages for executory contracts. The only authority cited for it is Section 610 of Sedgwick on Damages. That section says that "where there is no sufficiently certain proof of the amount of damages, nominal damages only are recoverable; the burden being on the plaintiff to prove the amount of damages." After citing various cases where damages were held to be too remote and uncertain to be estimated, the author continues, "It is, however, to be noticed that in such a case every reasonable presumption is to be made against the wrongdoing defendant, and if by the aid of such presumption the damages can be fixed the plaintiff may recover substantial damages."

The reason for invoking presumptions in such cases is to prevent a "wrongdoing defendant" from escaping the consequences of his wrong. As between an innocent and a guilty party, it is natural and right that the courts should try to see that the innocent does not suffer because of difficulties of proof.[10] But the doctrine that a wrongdoer shall not get off with nominal damages merely because the precise measure of the plaintiff's loss is difficult to establish has no application to pro-

[10]Such a situation is well illustrated in the single case cited in Sedgwick as authority for the sentence last above quoted. It is also the basis of this Court's decision in *Westinghouse Co.* v. *Wagner Co.*, 225 U.S. 604 discussed in *Sheldon* v. *Metro-Goldwyn Corporation*, 309 U.S. 390, 403, wherein it is stated that in a patent infringement suit when the plaintiff had shown the infringer's profits and the defendant had proved that part of the profits had been produced by added and non-infringing improvements, the burden of proof shifted back to the plaintiff to show what part of the profits had resulted from the infringement. The court found that as the defendant had made it "not merely difficult but impossible to carry the burden of apportionment" the whole indivisible profit must go to one party or the other, and the law would not permit it to go to the wrongdoer.

ceedings where the issue is between parties none of whom is guilty of any wrong.

In the instant case, for example, there is no "wrong-doing defendant". The lease was not rejected by the lessee or by those who will be required to pay if respondent is allowed to recover damages,[11] but by agents of the Bankruptcy Court acting on that Court's advice and with its consent. The controversy is between one who seeks to prove as an unsecured creditor, despite the fact that he has received back his entire property,[12] and all of the other unsecured creditors. The latter do not get their property back but must be content with dividends on their claims. If the repossessing landlord is also permitted to share in the debtor's estate, the dividends of the other creditors will be further reduced.

This result, we respectfully submit, was not contemplated by Sedgwick and should not be brought about by substituting for proof of actual loss a "presumption" intended only for protection against wrongdoers.

IV.

The commonly accepted formula for damages for loss of future rent is "the difference between the rental value of the remainder of the term and the rent reserved, both discounted to present worth."[13] That is the measure for which respondent contended at the first trial in this case and the measure approved by

---

[11] Division Four of the Interstate Commerce Commission has found that there is no equity for existing stockholders. (*N.Y., N.H. & H. RR Reorganization*, 239 I.C.C. 337, 418.)

[12] Actually respondent has received more than its original property to the extent of additions and sinking funds paid for by the lessee and forfeited upon termination of the lease. See *Connecticut Railway & Lighting Co.* v. *Palmer*, 305 U.S. *supra*, p. 505.

[13] *City Bank Co.* v. *Irving Trust Co.*, 299 U.S. 433, 443.

this Court on the first appeal.[14] It is also the measure urged by respondent at the second trial, except that he did not ask the court to go beyond forty years into the future.

There is nothing in the statute,[15] however, which requires that damages be determined by reference to "rental value" as such. In computing the loss for rejection of a lease "rental value" is a convenient concept for describing the subtrahend, but it should not be permitted to conceal what the majority opinion recognizes as "the final objective of the proof", namely "not how much the remainder is worth now but what damages the lessor has suffered".[16]

A landlord whose lease has been rejected loses the right to receive the rent reserved therein for the balance of the term and in its place receives back his property with the right to use or dispose of it as he sees fit. He does not have to relet it. He may sell it or operate it himself. He suffers no "actual damage" unless the greatest value which may reasonably be realized out of the property during the time for which he has regained it is less than the rent reserved in the lease. Rental value is only one, and not necessarily the largest, aspect of true value.

The landlord may therefore prove his damages by any proper evidence of value. If the term is not too long, he may succeed in persuading the judge to estimate earnings or other value for the entire balance. If it extends far enough into the future, he may be able to convince the court that the value of what he has re-

---

[14] 305 U.S. *supra*, p. 504.

[15] Section 77 or any other section of the Bankruptcy Act.

[16] 85 L. Ed. *supra*, p. 287; 61 S.Ct. *supra*, p. 383.

covered is fairly represented by the value of the fee. In an intermediate case he may be able to show how the total value of the property should be allocated as between the term and the reversion. He is not limited to proving "rental value."

Perhaps this is what is meant by the statement in the majority opinion that "future rental value cannot be susceptible of precise proof".[17] If that statement means that *no* future value can be proved it is hard to reconcile with the Court's previous holding that the language added to Section 77 in 1935 was "intended to call emphatically to the attention of those administering the reorganization section the requirement that only those damages susceptible of definite proof should be allowed".[18]

If the landlord shall fail to produce evidence which satisfies the mind of the court that the value of the entire estate which he receives back will be less than the rent reserved, the purpose of the statute is not to see to it that he recovers some damages in addition to repossessing his property, but on the contrary to protect the estate, i.e., the other creditors, against his claim. He is not made a creditor merely by virtue of the fact that his lease has been rejected. The statute says that "any person injured by . ... rejection shall . . . be deemed to be a creditor . . . to the extent of the actual damage or injury".[19] Unless he can show "actual damage or injury," he is not even to be "deemed to be a creditor".[20]

---

[17]85 L. Ed. *supra*, p. 287; 61 S.Ct. *supra*, p. 384.

[18]305 U.S. *supra*, p. 502.

[19]Bankruptcy Act, Section 77(b).

[20]The possible inference in the majority opinion (85 L.Ed. p. 287, 61 S.Ct. p. 383) that nominal damages might be recoverable in the absence of proof of "actual damage or injury" was probably not intended.

This Court has already held that the purpose of Congress in making claims for future rent provable and dischargeable was "directed generally at the rehabilitation of debtors."[21] It is therefore not to be assumed that landlords were the object of particular Congressional solicitude or are to be given greater rights than the statute plainly requires. They are deprived of their former right to treat their leases as still extant and hold the tenants for future rent as it accrues. In the case of railroad tenants, however, that right was valueless[22] because reorganization in equity by sale of assets to a new corporation left the landlord with a succession of future actions against an empty shell. In place of this worthless right, the landlord was given the possibility of sharing in the debtor's estate if he could convince the court that repossession of his property for the entire unexpired term of the lease would not make him whole for loss of the rent. This is precisely what respondent here has twice failed to do. And such failure, under the statute, leaves the landlord just where he would have been prior to the statute if he had elected to repossess his property instead of to treat the lease as continuing in effect.

The majority opinion notes that the Act gives a landlord a new right of recovery which is "an unsecured claim of the character of a claim for a deficiency above the value of inadequate collateral".[23] But this right arises not by virtue of the mere rejection of the lease, but only if the landlord has proved that he had suffered "actual damage or injury" thereby, in other words, only if he has proved with certainty the *fact* of damage.

---

[21] 305 U.S. *supra*, p. 501.

[22] *City Bank Co.* v. *Irving Trust Co.*, *supra*, p. 437.

[23] 85 L. Ed. p. 289; 61 S.Ct. p. 385.

As the majority opinion holds, "Certainty in the *fact* of damage is essential."[24] Without it the landlord is not to "be deemed to be a creditor" because, for all the court knows, he may be better off with his property than he would have been with the rent. It is only after the "fact of damage" has been established that the right to participate in the debtor's estate arises and the question of the amount of such participation becomes important. When that right has been established, "Certainty as to the amount goes no further than to require a basis for a reasoned conclusion".[25]

We therefore submit that while a reasonable presumption might under some circumstances be sufficient to fix the *amount,* it cannot properly be used under this statute to establish the *fact,* of damage.

For the reasons stated above we pray that this Court will grant a rehearing and restore this case to its docket for reargument, or in the alternative will recall its decision of January 6, 1941, reverse the decision of the Circuit Court of Appeals and order the judgment of the District Court affirmed; and that in either event its mandate will be stayed until final disposition of the case.

JAMES GARFIELD

HERMON J. WELLS

Attorneys for Petitioners.

January 29, 1941

---

[24]85 L. Ed. *supra,* p. 289; 61 S.Ct. *supra,* p. 385 (italics ours).

[25]Idem.

CERTIFICATE

I, James Garfield, of counsel for the petitioners, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

JAMES GARFIELD.

Blank Page

P. 7.

SUPREME COURT OF THE UNITED STATES.

No. 38.—October Term, 1940.

Howard S. Palmer, James Lee Loomis and Henry B. Sawyer, Trustees of the property of the New York, New Haven and Hartford Railroad Company, Debtor, Petitioners,
vs.
Connecticut Railway & Lighting Company.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[January 6, 1941.]

Mr. Justice Reed delivered the opinion of the Court.

This certiorari, which we allowed because of its importance, involves problems of proving a lessor's claim for damages for rejection of its lease in a proceeding under Section 77 of the Bankruptcy Act. The lease, demising respondent's street railway properties and equipment in Connecticut for 999 years from 1906, was rejected on December 18, 1935, by petitioners, the trustees of the debtor, the New York, New Haven and Hartford Railroad Company.[1] The annual rent reserved at rejection was close to $1,050,000 with tax, sinking fund, interest and bond retirement adjustments, which are not material to our discussion.

After rejection the lessor filed a claim for damages under subsection (b) of Section 77. The applicable provisions are as follows:

". . . . In case an executory contract or unexpired lease of property shall be rejected, . . . any person injured by such . . . rejection shall for all purposes of this section be deemed to be a creditor of the debtor to the extent of the actual damage or injury determined in accordance with principles obtaining in equity proceedings . . ."

The claim was allowed, limited to the damages accrued or which might accrue before the winding up of the reorganization. This

[1] The lease originally covered additional properties, but as to these the debtor no longer had an interest.

Court on a previous certiorari[2] disapproved that measure of damages and laid down as the measure "the present value of the rent reserved less the present rental value of the remainder of the term." On remand to the district court, the lessor undertook to prove damages according to the approved measure by introducing evidence of the present value (January 1, 1936), at four per cent discount, of the rent reserved under the lease for forty years only (to December 31, 1975). This amounted to around twenty million dollars. For a corresponding period evidence of rental value similarly discounted was offered. The difference was submitted as the damages for rejection. No proof of rent reserved or rental value beyond the forty years was offered as respondent was advised such proof would be too uncertain to carry conviction.

To prove rental value, respondent offered evidence of annual earnings for each of the forty years. These earnings were made up of the earning power of a sinking fund, plus an adjustment of the annual payments required by the lease to be made to the sinking fund, plus the operating profits of the transportation properties. For 1936-1938 the actual earnings were used. This was the period after rejection and before trial when the demised properties were operated by or for respondent. For 1939-1975 earnings were estimated by alternative calculations of average annual earnings, before federal taxes, over four prior base periods each ending December 31, 1938: (1) the preceding year and a half of 100% bus operation; (2) the three years of actual operation, following rejection, during which the transition from trolleys to buses had been completed; (3) ten years, 1929-1938, the accounts for which were partly reconstructed because before the reorganization the demised premises were utilized in conjunction with others not involved here; and, finally, (4) fourteen years, 1925-1938.[3] The earning power of the sums in the sinking fund and the annual payments to it were assumed to be fixed. To get the rental value, these two fixed sums were added to the operating profit calculated from each of the four base periods. Since earnings were erratic, varying from $78,000 to $775,000 in the fourteen-year period, the annual rental value for the future

[2] Connecticut Railway & Lighting Co. *v.* Palmer, 305 U. S. 493, 504.

[3] To fill out the data petitioner calculated the proportionate rent reserved and the actual earnings for the short period between the date of rejection, December 17, 1935, and January 1, 1936.

varied according to the base used. Likewise, the damages calculated for forty years showed a range of from nine and a half to thirteen and a third million. It is substantially correct to say that no evidence in disagreement with the base figures was produced for the petitioner. Nor did petitioner introduce any evidence on its part to establish a different amount of damages.

The district court refused to find future earnings by projecting the average earnings of any of the four base periods. It pointed out that in its view the 100% bus operation was too new and had coincided with too great a shrinkage of earnings to serve as a safe guide. The data for 1936-1938 were deemed unconvincing because they were derived in a substantial measure from trolley operations, now abandoned, and because the period was one of economic depression. The ten and the fourteen-year bases were disapproved as irrelevant because of trolley operation, and as speculative because of the impossibility of forecasting the relative frequency of profitable and unprofitable years from this past experience. The court pointed out that no evidence of transportation experts or surveys was offered to assist it in appraising possibilities of the development of the territory, of increased operating efficiency or the effects of consolidation.[4] Furthermore, the trial court was of the view that even with acceptable proof of annual rental value for forty years, or other period materially shorter than the unexpired term of the lease, no conclusion could be reached as to the present rental value of the remainder of the term, because that portion of the term beyond the reach of the proof offered might have profits or losses which would upset the calculations for earlier years. The district court then struck out the accrued damages of more than a million dollars allowed on the former hearing and set aside the provision of the same order permitting accrued damages to be proven up to the date of final hearing.

The circuit court of appeals was of the view that "in effect, the law for purposes of damages treats a lease with 969 more years to run as if it were only for a term within the reach of fairly definite forecast." It thought that the evidence of earnings over the fourteen-year experience was adequate to enable it to draw a reasoned conclusion as to probable earnings for eleven years. For the three

[4] See another New Haven long term lease, In re New York, N. H. & H. R. Co., 30 F. Supp. 541, where evidence of this kind appears.

years, 1936-1938, these were known; for the other eight years, the average annual earnings for the preceding 14-year period were adopted. An allowance of the damages at time of rejection was made in the amount of $4,411,837.61.[5]

The certiorari brings here the questions of whether proof of damages for a portion of an unexpired lease is sufficient to fix damages for the whole remaining term and whether the circuit court of appeals may allow damages on the sole basis of past earnings, evidence which the district judge has held does not satisfy his mind.

First.—Litigation over a 999-year lease naturally brings up incidents difficult to reconcile with known and established legal formulae. Since conveyancers and business men alike have long utilized the characteristic provisions of leases to accomplish transfers of rights in real estate for extensive periods without payment of the purchase price, such long term agreements have become a well recognized legal implement, especially in corporate realty transactions and railroad consolidations and mergers. Its reservations of rent, provisions for taxes and operation are firmly embedded in our financial, corporate and title structures.[6] Business and government alike are accustomed to fix the rental value of property for long term leases and the value of the lease over and above the rent reserved at varying periods of the term.[7] In pending railroad

[5] The preciseness of this figure as to the amount of damage is illusory. It is obtained by accepting estimated interest rate and average earnings for eight years in the future, reduced to present cash value, as shown by respondent on a table covering forty years and deducting this from the agreed rent, discounted.

[6] Nearly forty thousand miles of road are leased by Class I railroads from 292 lessors. Class I roads operate over 93 per cent of all railroad mileage. Leased property represents over 15 per cent of this total. Over four billion dollars is invested in railroad property under lease. Tables 1, 129, 156 and 162. Statistics of Railways in the United States 1938. See Meck & Masten, Railroad Leases and Reorganization, 49 Yale Law Journal 626.

[7] Tax Cases: In many tax cases long-term leases have been valued, though frequently without any statement of the evidence or method used. Northern Hotel Co., 3 B. T. A. 1099, 1102; Newman Theatre Co., 4 B. T. A. 390; L. S. Donaldson Co., 12 B. T. A. 271; A. H. Woods Theatre Co., 12 B. T. A. 827; Consolidated Investment Co., 13 B. T. A. 1252; Hotel Wisconsin Realty Co., 16 B. T. A. 334; James Bldg. Co., 22 B. T. A. 658; Martha Realty Co., 22 B. T. A. 342, 344; People ex rel. Delaware & Hudson Canal Co. *v.* Feitner, 61 App. Div. 129; Appeal Tax Court *v.* Western Maryland R. R. Co., 50 Md. 274, 298; Philadelphia, W. & B. R. Co. *v.* Appeal Tax Court, 50 Md. 397; People ex rel. Gorham Mfg. Co. *v.* State Tax Comm., 197 App. Div. 852. Eminent Domain Cases: Matter of the City of New York: Beers *v.* Schlessinger, 120 App. Div. 700; In re Park Site, 247 Mich. 1. Contract Cases: Bondy *v.* Harvey, 218 App. Div. 126; Williams *v.* Burrell, 1 C. B. 402.

reorganizations, themselves, appraisals of rental values must be considered.[8] That such determinations recur with some frequency demonstrates their practical possibility.

The petitioner contends, however, that evidence of rental value for a 40-year period, no matter how certain it may be, is inadequate to enable a court to establish the damages for the entire 969 remaining years. Its argument is that one cannot be sure the truncated portion will not show sufficient gain to absorb all losses. Since certain proof for distant years cannot be produced, this objection leaves the lessor to qualified opinion evidence as to annual rental value, discounted for the term to show present damage. Such an opinion necessarily proceeds from presumably adequate knowledge of what lessees, desiring but not requiring the facilities, would be willing to pay for a new lease and lessors, in a similar attitude toward renting, to accept for the remainder of the term. While such evidence is admissible for consideration in forming a judgment upon damages, it has little, if any, probative force beyond the immediate years. Certainly such opinion evidence alone cannot be permitted to fix rental value for purposes of damages in the indefinite future. The final objective of the proof is not how much the remainder is worth now but what damages the lessor has suffered. For this he is awarded compensation. The measure of that damage is rent less rental value, a matter of judgment to be reached in the light of pleading and proof supplemented by judicial knowledge.

The law for purposes of damages does not treat a broken lease of a thousand years as though it ran only for a limited time, the damages for which are measurable. But since evidence of the damage is necessarily limited to a time of "definite forecasts" the rule of rental value permits the use of data for only a limited number of years to determine damages. The number of years to be considered depends upon the fullness and quality of the evidence offered to establish the damages. Hence, whether a limited term beyond the reach of forecasts or the whole term is to be used as a base for rental value, the evidence of earnings would be projected

[8] E. g. New York, New Haven & Hartford Railroad Company Reorganization, 239 I. C. C. 337, 351, 386, 387, 389, 453; In re Chicago, Milwaukee, St. Paul and Pacific R. Co., No. 60463, N. D. of Ill., Eastern Division, slip opinion of October 21, 1940, p. 24 *et seq;* same, 239 I. C. C. 485, 537, 553; Erie Railroad Company Reorganization, 239 I. C. C. 653, 685, 689.

the same number of years. This, we think, is what was meant by the circuit court of appeals when it treated the lease "in effect" as one with a term within the range of predictability as to rental value.

However nebulous the concept of a long lease may be, it is not a fiction but an actual instrument. Nothing appears in the record to suggest that the rental agreed upon was other than a reasonable return upon the value of the demised property, fairly negotiated. At the time the lease was executed, it is fair to assume the parties thought the annual rent reserved and rental value were the same. Without proof to the contrary only nominal damages would be allowed the claimant. And, until something else is shown, courts are entirely justified in assuming that for the long years ahead the rent and the rental value are the same.[9] As a consequence, evidence of rental value smaller in amount than the rent reserved for a term shorter than the remainder of the lease is, in the absence of testimony as to other years, proof of the damages for the years covered. Since the presumption is that the rent and rental value for the remainder of the term are the same, the damage proven is to be considered as all the damage for the rejection of the lease.

Second. The petitioner also contends that the circuit court of appeals erred in setting aside the district court's decree refusing the claim on the ground that the evidence, detailed above, did not satisfy the mind as to the amount of damages. In the view of the trial court, there was a failure of proof. The correctness of the judgment of the appellate court in directing an allowance of the claim depends not upon its power, which we think is clear,[10] but upon its conclusion as to the persuasive character of the evidence, whether it is too speculative, whether it showed the damage to reasonable certainty. As there was no significant dispute over the facts proven, the conclusion as to the sufficiency of the evidence was for the reviewing court. We deal, in this review, with the method of the proof of damages, not the measure. Narrowed even more, the issue is whether the evidence offered justifies an award, whether the quantum of proof produced forms an adequate basis for a reasoned judgment.

---

[9] 2 Sedgwick, Damages, 9th Ed., § 610.

[10] Cf. Ridings *v.* Johnson, 128 U. S. 212, 218; United States *v.* Rio Grande Irrigation Co., 184 U. S. 416, 423.

Future rental value cannot be susceptible of precise proof. As it depends, so far as the amount of damages for breach of a lease is concerned, upon future profits, it partakes of the nature of loss of earning capacity or of credit. To require proof of rental value approaching mathematical certitude would bar a recovery for an actual injury suffered. All that can be done is to place before the court such facts and circumstances as are available to enable an estimate to be made based upon judgment and not guesswork.[11] Every breach of an anticipatory obligation, and every appraisal of damage involving the present value of property involves a prediction as to what will occur in the future. Present market value of property is but the resultant of the prediction of many minds as to the usability of property and probable financial returns from that use, projected into the future as far as reasonable, intelligent men can foresee the future.

The proof of future profits by the evidence of past profits in an established business gives a reasonable basis for a conclusion.[12] It is true that this business changed from trolley to bus within two years of the end of the base period and that management changed from lessee to lessor but we think the fact of transportation in the same communities for more than a quarter of a century sufficed to give the operation the classification of an established business. Here different methods of operation or normal changes in the executive staffs do not seem sufficient to interfere with the probative value of past experience. Franchises and property of street railways and bus lines are difficult of appraisal. Nothing is more indicative of their value for lease or sale of the fee than past earnings. If we were to adopt the view that the interest conveyed is a defeasible fee,[13] its defeasance dependent upon a condition such as nonpay-

[11] Story Parchment Co. *v.* Paterson Co., 282 U. S. 555, 563; Eastman Kodak Co. *v.* Southern Photo Co., 273 U. S. 359, 379; Eckington & S. H. R. Co. *v.* McDevitt, 191 U. S. 103, 112, 113; cf. dicta in United States *v.* Behan, 110 U. S. 338, 344; see Restatement Contracts, § 331, particularly comment (a); United States Trust Co. *v.* O'Brien, 143 N. Y. 284, 290; Ball *v.* Pardy Construction Co., 108 Conn. 549, 551; Commonwealth Trust Co. *v.* Hachmeister Lind Co., 320 Pa. 233; 1 Sedgwick, Damages, 9th Ed., § 170(a) *et seq.*; 1 Sutherland, Damages, 4th Ed., § 67.

[12] 5 Williston, Contracts, Rev. Ed. § 1346 A; Bagley *v.* Smith, 10 N. Y. 489, 498; Dickinson *v.* Hart, 142 N. Y. 183, 188; Macan *v.* Scandinavia Belting Co., 264 Pa. 384, 392; Commonwealth Trust Co. *v.* Hachmeister Lind Co., 320 Pa. 233, 242.

[13] Ocean Grove Camp Meeting *v.* Reeves, 79 N. J. L. 334, 338-39.

ment of annual instalments of the purchase price, the same difficulties exist. The unknown subtrahend would be the present value, instead of the rental value. Evidence of value would be made up of the items of proof. One of the most important of these, in the case of property such as here involved, would be past earnings.

This Court has sustained recoveries for future profits over four years based solely upon evidence of the profits of an established business for the past four years. We there approved an instruction which told the jury, "Damages are not rendered uncertain because they cannot be calculated with absolute exactness. It is sufficient if a reasonable basis of computation is afforded, although the result be only approximate".[14]

The ways compensatory damages may be proven are many. The injured party is not to be barred from a fair recovery by impossible requirements. The wrongdoer should not be mulcted, neither should he be permitted to escape under cover of a demand for nonexistent certainty.[15] Damages for breach of the lease were in contemplation of the parties when the contract was made.[16] The lease contained a covenant of reentry without prejudice to right of action for arrears of rent or breach of covenants. The provision in the Bankruptcy Act gives a new right of recovery in bankruptcy only. This right of recovery is an unsecured claim of the character of a claim for a deficiency above the value of inadequate collateral.

Certainty in the fact of damage is essential. Certainty as to the amount goes no further than to require a basis for a reasoned conclusion.[17] The certainty of the evidence as to damages for rejection of a lease depends upon the same tests as in other situations where damages are difficult of proof. This Court, recently, in an infringement case[18] was required to appraise the value of opinion evidence as to the part of profits attributable to the use of a pirated play, an obviously elusive fact. No expert thought any greater

---

14 Eastman Kodak Co. *v.* Southern Photo Co., 273 U. S. 359, 379.

15 Story Parchment Co. *v.* Paterson Co., 282 U. S. 555, 564, 565; Eastman Kodak Co. *v.* Southern Photo Co., 273 U. S. 359, 379; Hetzel *v.* B. & O., 169 U. S. 26, 37, 38.

16 Hadley *v.* Baxendale, 9 Exch. 341.

17 Story Parchment Co. *v.* Paterson Co., 282 U. S. 555, 562, 563; 1 Sedgwick, Damages, 9th Ed., § 170; United States Trust Co. *v.* O'Brien, 143 N. Y. 284, 289.

18 Sheldon *v.* Metro-Goldwyn Corp., 309 U. S. 390, 406-408.

percentage than ten should be attributed to the play. The lower court allowed twenty so that the award might by no possibility be too small. We approved because "what is required is not mathemathical exactness but only a reasonable approximation. That, after all, is a matter of judgment . . ."

Satisfactory evidence was presented for the three years of actual operation of the properties covered by this lease. We think that prior earnings of the same property over fourteen years was a fair base to use to project the estimate of the earnings for the eight years of future operation. The failure to produce further evidence, either through experts or transportation surveys, was not fatal to respondent's case, even though such evidence is admissible. We see no reason to disagree with the conclusion of the circuit court of appeals that under the evidence presented the damages for eight years might be predicted with a "fair degree of certainty."

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 38.—October Term, 1940.

Howard S. Palmer, James Lee Loomis and Henry B. Sawyer, Trustees of the Property of the New York, New Haven and Hartford Railroad Company, Debtor, Petitioners,
vs.
Connecticut Railway & Lighting Company.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[January 6, 1941.]

Mr. Justice Frankfurter dissenting.

On January 3, 1939, this Court unanimously decided that the "actual damage or injury" caused the lessor through the disaffirmance by the trustees of the New Haven of the lease now in controversy was a provable claim. *Connecticut Ry.* v. *Palmer*, 305 U. S. 493. If Congress had intended to rule out the legal provability of a claim for damages arising through the disaffirmance of what remains of a 999-year lease it could easily have done so, instead of providing for proof of the damages flowing from the termination of such an unexpired lease. And if, upon the prior consideration of the status of this very lease, this Court had intended to rule that loss due to the disaffirmance of the unexpired term of 969 years is in the nature of things beyond rational proof, it surely would not have taken twelve pages to avoid saying so. Both Congress and this Court have thus sponsored the conviction that proof of some damage is not outside the adjudicatory process.

But what is to be assessed is the value of a terminated long-term lease and not the value of an included short-term. Therefore, neither the decision of the district court nor that of the circuit court of appeals in reversing it seems to me satisfactory. Although the two courts reached contradictory conclusions, their views appear to suffer from the same intrinsic vice. Starting with man's inability to pierce into a future of 969 years, both courts deemed the present value of a lease running for such a period beyond calculable fore-

cast. Therefore, Judge Hincks said in effect, when an end is put to the benefits accruing from such a lease, the loss to the lessor cannot be translated into dollars and cents. Judge Patterson, on the other hand, treated the lease as though it were a lease for an ascertainable, included short term, and deemed eleven years as the limit for sure judgment. Since the lease is not a short-term lease, it is, according to the district court, nothing for purpose of giving rise to damages. Since the lease is for too long a term, we will snip off an included short term as though it were a short-term lease, concluded the circuit court of appeals.

Both these dispositions result in avoidance, through over-simplification, of an extremely complicated problem which Congress has put up to the courts. Since neither the district court nor the circuit court of appeals applied the directions of this Court in *Connecticut Ry.* v. *Palmer, supra,* however difficult and subtle they may have been, neither disposition should stand. The case should be sent back to the district court where an opportunity should be given to make proofs appropriate to the nature of the problem to be solved, namely, ascertainment on a tough business basis of the damage that sprang into existence from the disaffirmance of the remaining 969-year term rather than from the disaffirmance of a supposed 11-year lease.

SUPREME COURT OF THE UNITED STATES.

No. 38.—October Term, 1940.

Howard S. Palmer, James Lee Loomis and Henry B. Sawyer, Trustees of the Property of the New York, New Haven and Hartford Railroad Company, Debtor, Petitioners,
vs.
Connecticut Railway & Lighting Company.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[January 6, 1941.]

Mr. Justice Douglas, dissenting.

Mr. Justice Black and I are of the view that respondent's proof was wholly inadequate to establish under § 77(b) of the Bankruptcy Act the extent of its "actual damage or injury" as a result of the rejection of this lease, since the evidence offered failed to show what was "the present value of the rent reserved less the present rental value of the remainder of the term"—the measure of damages established for this very claim in *Connecticut Railway & Lighting Company* v. *Palmer*, 305 U. S. 493, 504.

We are dealing here with an unexpired term of 969 years. But the claim allowed is for a term which does not cover that span. It covers only an unexpired term of 11 years. For the reasons stated in *Kuehner* v. *Irving Trust Co.*, 299 U. S. 445, we think that if Congress had provided in § 77 that lessors should not be allowed to prove for damages in excess of an 11 year unexpired term, the limitation would be constitutional. Such legislation would have a firm constitutional basis in the bankruptcy power. But the making of such a limitation is a legislative, not a judicial, function. In view of the wording of § 77(b) we do not think this Court has the power to substitute the value of one property interest for the value of an entirely different one. Sec. 77(b) says that "actual damage or injury" shall be allowed. Yet it would be a mere coincidence if "actual damage or injury" for an 11 year term were the "actual damage or injury" for a 969 year term. Hence the District Court correctly refused to substitute any lesser term for the one here in

question. No authority, we believe, can be found which can justify speculating a claimant into a loss through the easy assumption that he had a property interest which in fact he did not have.

There is a related objection to the allowance of this claim. It is plain that any attempted computation of future rental values of this property for the next 969 years would at best be a mere flight "into the realm of pure speculation" which this Court condemned when the case was here before. 305 U. S. 493, 505. From our point in history 969 years hence is perpetuity. It covers a longer span than from 1941 A. D. to 500 years before Columbus discovered America. To project past earnings of a present enterprise through such vicissitudes of time would be to assume a static quality in society which even a decade of history would disprove. This was tacitly admitted by respondent before the District Court. The Circuit Court of Appeals recognized the impossibility of such a task. It therefore produced a substitute method. It computed the annual estimated values for each future year for as long a period as it could venture an estimate. That, however, misses the nature of the problem. Under the rule laid down by this Court, the great unknown in such cases is the "present rental value of the remainder of the term." The actual damage, if any, to the lessor is suffered all at once. For § 77, like former § 77B (*City Bank Farmers Trust Co.* v. *Irving Trust Co.*, 299 U. S. 433, 440) extends the doctrine of anticipatory breach (*Central Trust Co.* v. *Chicago Auditorium Association*, 240 U. S. 581) to leases of realty. Where there is such a breach "compensation therefor may be recovered at once for the whole loss, though the consequence be a continuing one, if the future damage resulting therefrom can be ascertained with certainty." *James* v. *Kibler's Adm'r*, 94 Va. 165, 173. The liability of the lessee for damages is single, not multiple. But § 77(b), unlike some state rules (*Hermitage Co.* v. *Levine*, 248 N. Y. 333), calls for an ascertainment of the full deficiency not at the end of the term but on rejection of the lease.

Lessors claiming damages under § 77(b), like claimants in ordinary bankruptcy proceedings (*Rasmussen* v. *Gresly*, 77 F. (2d) 252, 254; *Whitney* v. *Dresser*, 200 U. S. 532), carry the burden of establishing the existence and amount of the claim. Their proof must satisfy the "usual rules as to the measure of damages"; they

"must show damages to reasonable certainty". *Connecticut Railway & Lighting Company* v. *Palmer, supra,* at p. 505. While absolute certainty is not required where a claim for damages is sought (*Hetzel* v. *Baltimore & Ohio R. R. Co.,* 169 U. S. 26, 37), the evidence must be sufficient for the exercise of an informed judgment as to the amount. Where the existence or extent of the damage is a matter of mere conjecture or guess work, the claim will be denied. *Pennsylvania Steel Co.* v. *New York City Ry. Co.,* 198 Fed. 721, 759. When the instant case was here before, the *Pennsylvania Steel Co.* case was cited for the statement, "The difficulties of proof are well recognized." 305 U. S. at 504. In the *Pennsylvania Steel Co.* case damages for breach of a lease with an unexpired term of 995 years were disallowed in receivership proceedings, the court saying (p. 759): "Who could foretell the results of operation by the owner, the growth of the city, improvements in motive power, or reductions in cost? Who could foresee whether a lease could be made to another railroad company or the terms thereof? . . . The claim for such damages was properly disallowed because it was uncertain in amount and there was no method of making it certain."

Those observations are peculiarly apt when applied to the facts in this record. Here there is no evidence as to market value. Cf. *Metropolitan Bldg. Co.* v. *King County,* 62 Wash. 409. Nor has there been any fair, *bona fide* reletting. Cf. *James* v. *Kibler's Adm'r, supra.* In this record there is no substantial evidence as to value except estimated past earnings. Useful as past earnings may be in certain situations where a short and limited forecast is being made (*Eastman Kodak Co.* v. *Southern Photo Materials Co.,* 273 U. S. 359) they are indeed treacherous when used as the sole basis for appraisal.[1] The value of a going enterprise is dependent on earnings. A forecast of earnings must take into consideration the numerous and variable factors which affect income-producing capacity.[2] Those factors vary from business to business. Here we are dealing with passenger transportation by bus. Certainly any forecast of earnings should embrace an expert study of problems peculiar to this

1 1 Bonbright, Valuation of Property, c. XII.

2 Bonbright, *op. cit., supra,* note 1; Dewing, Financial Policy of Corporations, pp. 319 *et seq.;* Graham & Dodd, Security Analysis, c. I; Kniskern, Real Estate Appraisal & Valuation, pp. 235 *et seq.;* Mason, The Street Railway in Massachusetts, c. 6; McMichael, Long & Short Term Leaseholds.

field—the territory served, population trends, competitive conditions, the record of companies in comparable territory, and the like. Any estimate which wholly ignores such factors and relies entirely on past earnings ignores the very conditions which alone can impeach or sustain the credibility of past earnings as a measure of future earnings.[3] Cf. *Hammond Lumber Co.* v. *County of Los Angeles,* 104 Cal. App. 235.

The problem of determining the present value of this unexpired term of 969 years is not different from the problem of valuing a fee interest.

The fact that this instrument is called a "lease" is no barrier to such an appraisal. For, as stated by this Court in *Union Pacific Ry. Co.* v. *Chicago, Rock Island & Pacific Ry. Co.,* 163 U. S. 564, 582, where a so-called "lease" was construed: "What it was styled by the parties does not determine its character or their legal relations." The court has not only the power but the duty to determine its real character by consideration of all its intrinsic and extrinsic characteristics. *Id.,* at p. 582. A lease renewable forever or a lease in perpetuity (as here) is the equivalent of a fee interest. It has been so treated in Connecticut, where the instant lease was made, for purposes of taxation. *Connecticut Spiritualist Camp-Meeting Association* v. *Town of East Lyme,* 54 Conn. 152, 155-156. As stated in *Piper* v. *Meredith,* 83 N. H. 107, 110, "it is well settled law that a perpetual lease upon condition conveys to the lessee a determinable or base fee." Or as stated in *Whittelsey* v. *Porter,* 82 Conn. 95, 102, a 999 year lease is "practically a fee defeasible only upon failure to perform certain conditions." And see *Montgomery* v. *Town of Branford,* 107 Conn. 697, 702; *Wells* v. *Savannah,* 181 U. S. 531; *Leary* v. *Jersey City,* 248 U. S. 328; *Trustees of Elmira* v. *Dunn,* 22 Barb. 402. The mere reversionary interest of the lessor in a perpetual lease is so remote and speculative as to defy valuation. See *Chicago West Division Ry. Co.* v. *Metropolitan West Side Elevated R. R. Co.,* 152 Ill. 519, 524-526. As stated by the Supreme Court of Errors of Connecticut, the reversion under a 999 year lease becomes a "mere imaginary estate". *Brainard* v. *Town of Colchester,* 31 Conn. 407, 411. Whatever may be the precise catalogue of all rights of the lessee (*Goodwin* v. *Goodwin,* 33 Conn.

[3] In the Matter of Breeze Corporations, Inc., 3 S. E. C. D. & R. 709; In the Matter of Mining & Development Corp., 1 S. E. C. D. & R. 786.

314; *Dennis Appeal,* 72 Conn. 369) and whatever may have been the business and legal reasons for use of the 999 year lease rather than the acquisition of the assets by merger, consolidation or otherwise,[4] it is plain that for all practical purposes the lessee retains such full control and such complete enjoyment of the property that he may properly be treated as the owner. Such a lease is in effect "a practical sale". *Lord* v. *Town of Litchfield,* 36 Conn. 116, 126.

Thus the problem of determining the present value of the unexpired term of 969 years is no different from determining the value of land in an action for breach of a contract to purchase it. There the rule is that the vendor may recover compensation for his actual loss measured by the difference between the price he was to receive[5] (less the amount paid) and the value of the land at the time of breach. 3 Sedgwick on Damages (9th ed.) §§ 1023 *et seq; In re Marshall's Garage,* 63 F. (2d) 759. In making that valuation the conventional rules governing appraisals of the worth of fee interests would be applicable. 1 Bonbright, Valuation of Property, chs. XIII, XIV.

In sum, whatever rule of damages is applied to this situation, the proof submitted is not adequate for appraisal of the property interest here involved without violating the well-established rule against allowance of speculative damages, announced by this Court on the first appeal. No reasons of policy have been suggested which justify deviation from those well-established principles. The fact that the "lease" extends over a period of almost ten centuries accentuates the necessity for close adherence to the rule, not for its relaxation.

---

[4] McMichael, *op. cit., supra,* note 2, c. I; Meck & Masten, Railroad Leases and Reorganization, 49 Yale L. J. 626; Niehuss & Fisher, Problems of Long Term Leases, 2 Mich. Bus. Studies, Pamphlet 8; The Long Term Ground Lease: A Survey, 48 Yale L. J. 1400.

[5] Future payments would of course be reduced to present worth. Bondy v. Harvey, 218 App. Div. 126.